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# HANDBOOK FOR PROSECUTORS

B.W. LONG, B.A., LL.B.

*Third Edition*

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## ACKNOWLEDGMENTS

The initial impulse to provide some assistance to Provincial Prosecutors resulted in two earlier editions of this Handbook. Since the publishing of the Second Edition in 1987, I have collected notes scratched on fragments of paper, suggestions from readers who were kind enough to forward their thoughts, memoranda of law, unreported cases and other miscellaneous writings. All of these found their way into a folder entitled "For The Third Edition". This collection exercise was more therapeutic than preparatory inasmuch as I was able to avoid a confrontation with another edition while the collection process continued.

At different times I sincerely believed that the Handbook should be entirely rewritten for a third edition - even a new title was in order - however it was not to be written in short spurts of enthusiasm or inspiration. A Third Edition would require someone who would pursue the legal developments since 1987 and who possessed an unflagging concern for accuracy along with a precision of expression.

Simon Johnson, B.A., LL.B., LL.M., came to the task with an enviable academic record and obvious abilities. His very large and able assistance overcame my reluctance to commence the Third Edition. Except for a hiatus while he studied at the School of Law, King's College, University of London, London, England, and received the degree of LL.M. with Distinction, Mr. Johnson relentlessly pursued this project with more than due diligence.

The final tedious stages included proofreading, the checking of citations and miscellaneous minutae which were shepherded to completion by Peter J. Allen, student-at-law, whose example and enthusiasm carried me along to the end of the task. I am grateful for his most capable assistance and attention to the plethora of detail.

Finally, I especially want to thank and recognize the support and understanding of my wife Debbie who has patiently endured the long hours of work involved in this project and who makes coming home the highlight of my day.

I am acutely aware of the limitations of this edition. It is not intended to be a substitute for a reader's personal review of the cases cited or the texts described herein. It should be likened to a compass which points the traveller in the desired direction but the reaching of the actual destination must be the responsibility of the person who embarks on the journey. However, I am pleased if I have been able to provide some assistance along the way.

Bruce W. Long  
Director of Crown Attorneys, Southwest Region  
Ministry of the Attorney General



## TABLE OF CONTENTS

GENERAL PRINCIPLES  
AND DEFENCES

ABUSE OF PROCESS .....	G1-1
Introduction .....	G1-1
Definition of Abuse of Process .....	G1-1
Burden of Proof .....	G1-2
Applicability to Provincial Offences .....	G1-2
Need for State Involvement .....	G1-2
Relevance of Motive .....	G1-3
Timing .....	G1-3
Examples Where Abuse of Process Found .....	G1-3
Examples Where Abuse of Process Not Found .....	G1-3
Not as a Defence .....	G1-4
 CONTEMPT OF COURT .....	 G2-1
Introduction .....	G2-1
Statutory Provisions .....	G2-1
Definition of Contempt .....	G2-1
Forms of Contempt .....	G2-1
Jurisdiction of Provincial Judge .....	G2-2
Jurisdiction of Justice of the Peace .....	G2-2
Initiation of Proceedings .....	G2-3
Procedure on Contempt Hearing .....	G2-3
Mental Element for Contempt .....	G2-5
Propriety of Judge Hearing Own Contempt Proceeding .....	G2-5
Whether Failure of Counsel to Appear Contempt .....	G2-5
Examples of Contempt in the Face of the Court .....	G2-6
Sentence for Contempt .....	G2-7
Barring Counsel and Others from Appearing .....	G2-7
Disturbances Outside the Courtroom .....	G2-8
Charter .....	G2-8
Power to Exclude Persons from Courtroom .....	G2-8

RIGHT TO COUNSEL .....	G3-1
Introduction .....	G3-1
Provincial Offences Act .....	G3-1
Defendant's Right to Counsel--Pre Charter .....	G3-1
S.10(b) Right to Counsel under the Charter .....	G3-2
When is a Defendant Arrested or Detained? .....	G3-2
Informing the Defendant of His Right to Retain and Instruct Counsel ..	G3-3
Change in Circumstances .....	G3-4
Duty to Inform Defendant of Availability of Legal Aid .....	G3-5
Reasonable Opportunity to Retain Counsel .....	G3-5
Duty Not to Question Defendant .....	G3-5
Unavailability of Counsel .....	G3-6
Withdrawal of Defence Counsel by Defendant .....	G3-6
Withdrawal by Defence Counsel .....	G3-6
Counsel Who is Absent at Trial .....	G3-7
Remedy .....	G3-7
 DEFENCES: GENERAL PRINCIPLES .....	 G4-1
Introduction .....	G4-1
Statutory Provisions .....	G4-1
Availability for Offences of Strict and Absolute Liability .....	G4-1
Onus of Proof .....	G4-2
 DEFENCES: DE MINIMIS .....	 G5-1
Introduction .....	G5-1
Criminal Offences .....	G5-1
Provincial Offences .....	G5-1
Careless Driving .....	G5-2
 DEFENCES: IMPOSSIBILITY .....	 G6-1
Introduction .....	G6-1
The Law in England .....	G6-1
The Law in Canada .....	G6-1



MISTAKE OF LAW AND OFFICIALLY INDUCED ERROR .....	G7-1
Introduction .....	G7-1
Provincial Offences Act .....	G7-1
Meaning of "Mistake of Law" .....	G7-1
Non-Publication of Regulation .....	G7-2
Due Diligence in Ascertaining Law .....	G7-2
Effect on Sentence .....	G7-3
Officially Induced Error .....	G7-3
 DEFENCES: NECESSITY .....	 G8-1
Introduction .....	G8-1
Nature of the Defence .....	G8-1
Availability for Provincial Offences .....	G8-1
Urgent and Imminent Peril .....	G8-1
Nature of Harm Threatened .....	G8-2
Creation of Situation of Necessity .....	G8-2
Availability of Alternatives .....	G8-3
 JUSTICE OF THE PEACE .....	 G9-1
Introduction .....	G9-1
Provincial Offences Act .....	G9-1
Powers and Duties of a Justice of the Peace .....	G9-1
Role of Justice when Adjudicating Provincial Offences Court .....	G9-2
Allowing Counsel for the Defendant to Present Argument .....	G9-2
Discussions with Counsel .....	G9-3
The Right of a Justice/Judge to ask Questions in Court .....	G9-3
Protecting Witnesses .....	G9-4
The Right of a Justice/Judge to Call Witnesses .....	G9-4
Restoring Order/Preventing Disorder .....	G9-4
Right of Justice to Raise Charter Issues .....	G9-5
Stare Decisis .....	G9-5
Independent and Impartial .....	G9-5
Functus Officio .....	G9-5
 ONTARIO COURT (PROVINCIAL DIVISION) .....	 G10-1
Introduction .....	G10-1
Statutory Provisions .....	G10-1
Presiding Judge .....	G10-1

PARTIES TO AN OFFENCE .....	G11-1
Introduction .....	G11-1
Provincial Offences Act .....	G11-1
Aiding and Abetting .....	G11-1
Abet Defined .....	G11-2
Counselling Defined .....	G11-2
Procure Defined .....	G11-2
Common Intention/Purpose .....	G11-3
Accused Tried Alone .....	G11-3
Secondary Offenders in Driving Offences .....	G11-4
 PROSECUTOR .....	 G12-1
Introduction .....	G12-1
Provincial Prosecutors .....	G12-1
Crown Counsel's Authority .....	G12-2
Duty of: .....	G12-2
Prosecutorial Discretion .....	G12-3
Personal Opinions .....	G12-3
Denial of Crown's Right to Fair Trial .....	G12-3
Calling of Witnesses .....	G12-3
Stay of Proceedings .....	G12-4
 THE RULE AGAINST MULTIPLE CONVICTIONS .....	 G13-1
Introduction .....	G13-1
Distinguished from other double jeopardy concepts .....	G13-1
Interpretations of the Rule .....	G13-1
The rule after <b>Prince</b> .....	G13-2
 STARE DECISIS .....	 G14-1
Introduction .....	G14-1
Principle of Stare Decisis .....	G14-1
Extent to which Decision Binding .....	G14-1
Unreported Decisions .....	G14-1
Courts of Co-Ordinate Jurisdiction .....	G14-2
Decisions of Higher Courts .....	G14-2
Decisions of Higher Courts in Other Counties .....	G14-3
Conflicting Decisions .....	G14-3
Higher Courts in Other Provinces .....	G14-3
Refusal of Leave to Appeal .....	G14-3
Ontario Court of Appeal .....	G14-4
Supreme Court of Canada .....	G14-4



STRICT/ABSOLUTE LIABILITY .....	G15-1
Introduction .....	G15-1
Definition of Strict Liability Offences .....	G15-1
Due Diligence/Mistake of Fact .....	G15-1
Examples .....	G15-2
Other Defences to Strict Liability Offences .....	G15-2
Party to a Strict Liability Offence .....	G15-3
Definition of Absolute Liability Offences .....	G15-3
Test to Determine Whether Strict or Absolute Liability .....	G15-4
Wording of Absolute Liability Offence .....	G15-4
Defences to Absolute Liability Offences .....	G15-5
Defences to Mens Rea Offences .....	G15-5

## PROCEDURE

ADJOURNMENTS .....	P1-1
Introduction .....	P1-1
Provincial Offences Act .....	P1-1
Loss of Jurisdiction .....	P1-1
Failure of Defendant to Attend .....	P1-2
Adjournments to Secure Counsel .....	P1-2
Adjournments to Secure Witnesses .....	P1-3
Adjournments in Provincial Courts (Criminal Division) .....	P1-3
Procedure on Adjournments .....	P1-5
ATTENDANCE OF DEFENDANT .....	P2-1
Introduction .....	P2-1
Provincial Offences Act .....	P2-1
Summons from Another Justice .....	P2-1
Issuance of a Warrant .....	P2-1
Process Upon an Amended Information .....	P2-1
Errors In Wording of Summons .....	P2-2
Process Returnable on Incorrect Day .....	P2-2
Service on a Corporation .....	P2-2
Summons After Limitation Period .....	P2-2
Dispute Without Appearance .....	P2-3
Defective Service of a Summons or Other Process .....	P2-3
Waiver of Defects in Service .....	P2-3
Appearance at Court Office .....	P2-3
Appearance to Attack the Process .....	P2-4
Failure of Defendant to Appear .....	P2-4

ATTENDANCE OF WITNESSES .....	P3-1
Introduction .....	P3-1
Provincial Offences Act .....	P3-1
Issuance of Summons .....	P3-1
Production of Documents .....	P3-1
Witness in Custody .....	P3-2
Warrant Rather Than Summons .....	P3-2
Quashing a Summons .....	P3-2
Summons Served on Defence Counsel .....	P3-2
Summons Served on Crown Counsel .....	P3-2
Effect of Non-Attendance of Summonsed Witness .....	P3-3
 CERTIFICATE OF OFFENCE .....	 P4-1
Introduction .....	P4-1
Provincial Offences Act .....	P4-1
Availability .....	P4-1
Commencement of Proceedings .....	P4-1
Date of Filing .....	P4-2
Name of Court .....	P4-2
Errors in Preprinted Form .....	P4-3
Validity of Charge .....	P4-3
Defects which Nullify the Certificate .....	P4-3
Signature of Person Charged .....	P4-4
Signature of Issuing Provincial Offences Officer .....	P4-4
Amendments to Certificates of Offence .....	P4-4
 DUPLICITY .....	 P5-1
Introduction .....	P5-1
Provincial Offences Act .....	P5-1
The Test .....	P5-1
Effect of Finding of Duplicity .....	P5-2
 EXCLUSION OF WITNESSES .....	 P6-1
Introduction .....	P6-1
Purpose .....	P6-1
Scope of the Order .....	P6-1
Exceptions to the Order .....	P6-2
Effect of Witness Remaining in Courtroom .....	P6-2
Communication With Excluded Witness .....	P6-3

INFORMATION .....	P7-1
Introduction .....	P7-1
Provincial Offences Act .....	P7-1
Who May Be An Informant .....	P7-1
Duties of the Justice .....	P7-1
Omission of Date in Jurat .....	P7-3
Illegible Signature in Jurat .....	P7-4
Use of Stamp to Affix Signature .....	P7-4
Failure to Complete Summons Return .....	P7-4
Defects Within Informations .....	P7-4
Name of Defendant .....	P7-5
Time of Offence .....	P7-5
Place of Offence .....	P7-6
Single Transaction .....	P7-6
Factual Sufficiency .....	P7-8
Statement of Offence .....	P7-9
Mode of Participation .....	P7-10
Specification of Statute .....	P7-10
Incorrect Section Number .....	P7-10
Amendment of Information .....	P7-10
Time of Amendment .....	P7-11
 JOINDER OF COUNTS .....	 P8-1
Introduction .....	P8-1
Provincial Offences Act .....	P8-1
Tests for Joinder .....	P8-1
Joinder of Criminal Code and Provincial Offences .....	P8-1
Further References .....	P8-2
 JOINDER OF DEFENDANTS .....	 P9-1
Introduction .....	P9-1
Provincial Offences Act .....	P9-1
The General Principle .....	P9-1
Tests for Joinder .....	P9-1
Further References .....	P9-1

JURISDICTION OVER OFFENCE .....	P10-1
Introduction .....	P10-1
Provincial Offences Act .....	P10-1
Courts of Justice Act .....	P10-1
Territorial Jurisdiction .....	P10-1
Change of Venue .....	P10-2
Offence in Several Jurisdictions .....	P10-3
Jurisdiction of the Justice .....	P10-3
Information Not Before Court .....	P10-3
Seizure of Jurisdiction .....	P10-3
 JURISDICTION OVER OFFENDER .....	P11-1
Introduction .....	P11-1
Provincial Offences Act .....	P11-1
Upon Adjournments .....	P11-1
Trial <i>Ex Parte</i> .....	P11-1
Power to Require Continuing Attendance .....	P11-3
Further References .....	P11-3
 LIMITATION PERIOD .....	P12-1
Introduction .....	P12-1
Provincial Offences Act .....	P12-1
When Proceedings Commenced .....	P12-1
Commencement After Limitation Period .....	P12-1
Time Period in Information Partly Outside Limitation Period .....	P12-2
Continuing Offences .....	P12-2
Amendment of Information After Limitation Period .....	P12-2
 MOTION FOR NONSUIT .....	P13-1
Introduction .....	P13-1
Tests .....	P13-1
Circumstantial Evidence .....	P13-2
Procedure .....	P13-2
Motion By Court .....	P13-2
Co-Defendant Seeking Nonsuit .....	P13-3
Included Offences .....	P13-3
Crown May Reopen Case .....	P13-3
Defence Calling No Evidence .....	P13-3

OFFENCE NOTICE .....	P14-1
Introduction .....	P14-1
Provincial Offences Act .....	P14-1
Validity .....	P14-1
 PARKING INFRACTIONS .....	 P15-1
Introduction .....	P15-1
Provincial Offences Act .....	P15-1
Sufficiency of Certificate .....	P15-1
 PARTICULARS .....	 P16-1
Introduction .....	P16-1
Provincial Offences Act .....	P16-1
Purpose of Particulars .....	P16-1
Parties to an Offence .....	P16-2
Discretionary Order .....	P16-2
When Particulars Can Be Ordered .....	P16-2
Crown Unable to Supply Details .....	P16-3
Statement of Crown Not Particulars .....	P16-3
Demand for Evidence .....	P16-3
Effect of Particulars .....	P16-3
Certificate of Offence .....	P16-4
 PLEAS .....	 P17-1
Introduction .....	P17-1
Provincial Offences Act .....	P17-1
Pleas Available .....	P17-1
Refusal to Plead .....	P17-1
Effect of Guilty Plea .....	P17-1
Factual Foundation of Guilty Plea .....	P17-2
Withdrawal of Guilty Plea .....	P17-2
Examples of Permitted Changes of Plea .....	P17-3
Examples of Refusal to Allow Change of Plea .....	P17-3
Plea to a Lesser Offence .....	P17-4
Guilty with an Explanation .....	P17-4
Previous Guilty Plea Admissible .....	P17-5
Refusal to Accept Plea on Other Counts .....	P17-5
Effect of Guilty Plea on Sentence .....	P17-6
Plea by Counsel .....	P17-6

SENTENCE .....	P18-1
Introduction .....	P18-1
Provincial Offences Act .....	P18-1
Proof of Prior Convictions .....	P18-1
Availability of Discharge .....	P18-1
Relief Against Minimum Fine .....	P18-1
Sentences of Imprisonment .....	P18-2
 SEVERANCE OF COUNTS .....	 P19-1
Introduction .....	P19-1
Provincial Offences Act .....	P19-1
The General Principle .....	P19-1
Test .....	P19-1
Onus .....	P19-2
Discretionary Order .....	P19-2
Arguments for Severance .....	P19-2
Additional Grounds to Oppose Severance .....	P19-3
Charter Issues .....	P19-3
 SEVERANCE OF DEFENDANTS .....	 P20-1
Introduction .....	P20-1
Provincial Offences Act .....	P20-1
The General Principle .....	P20-1
Test .....	P20-1
Matter of Discretion .....	P20-2
Timing of Application .....	P20-2
Common Enterprise .....	P20-2
Language of Co-Defendant .....	P20-3
Unequal Strength of Evidence .....	P20-3
Grounds Advanced for Separate Trials .....	P20-3
Additional Grounds Against Separate Trials .....	P20-5
 STAY OF PROCEEDINGS .....	 P21-1
Introduction .....	P21-1
Provincial Offences Act .....	P21-1
Entry of Stay .....	P21-1
Recommencement .....	P21-1



SURPLUSAGE .....	P22-1
Introduction .....	P22-1
Provincial Offences Act .....	P22-1
The General Rule .....	P22-1
The Proviso .....	P22-1
Examples of Surplusage .....	P22-2
Wrong Section Number of Statute .....	P22-2
 WITHDRAWAL OF CHARGES .....	 P23-1
Introduction .....	P23-1
Provincial Offences Act .....	P23-1
Crown Only to Withdraw .....	P23-1
Prior to Plea .....	P23-1
After Plea .....	P23-1
Effects of a Withdrawal .....	P23-2
Compared to a Stay of Proceedings .....	P23-2
 YOUNG OFFENDERS .....	 P24-1
Introduction .....	P24-1
Provincial Offences Act .....	P24-1
Definition of "Young Person" .....	P24-1
Process .....	P24-1
Notice to Parents .....	P24-1
Arrest .....	P24-2
Trial .....	P24-2
Sentence Options .....	P24-2

## EVIDENCE

ACCOMPLICES .....	E1-1
Introduction .....	E1-1
Definition of Accomplice .....	E1-1
Corroboration of Accomplice Evidence .....	E1-1
Crown Calling An Accomplice .....	E1-2
Defence Witnesses .....	E1-2

ADVERSE WITNESS .....	E2-1
Introduction .....	E2-1
Refreshing Memory .....	E2-1
Ontario Evidence Act, s. 23 .....	E2-2
Meaning of "Adverse" .....	E2-2
Meaning of "Inconsistent" .....	E2-2
Method of Proving Adversity .....	E2-3
Oral or Written Statements .....	E2-3
Proof of Prior Inconsistent Statement .....	E2-3
Residual Discretion of Judge .....	E2-4
Effect of Prior Inconsistent Statement .....	E2-4
Right to Cross-Examine under s. 23 .....	E2-4
Use of s. 23 on Re-Examination .....	E2-4
Procedure for Use of s. 23 .....	E2-5
Cross-Examination of Hostile Witness .....	E2-6
ALIBI .....	E3-1
Introduction .....	E3-1
Alibi And Other Defences .....	E3-1
Disclosure of Alibi .....	E3-1
Order of Alibi Evidence .....	E3-2
Failure of Defendant to Testify .....	E3-2
Reply Evidence .....	E3-2
Consideration of Alibi as a Defence .....	E3-3
Degree of Proof .....	E3-3
Inferences from an Alibi Which is not Accepted .....	E3-3
Contradictory Alibi Statements .....	E3-4
Attacking an Alibi Defence .....	E3-4



BURDEN OF PROOF .....	E4-1
Introduction .....	E4-1
Evidential Burden .....	E4-1
Burden of Persuasion .....	E4-2
Provincial Offences .....	E4-3
Charter of Rights .....	E4-3
Burden of Proof for Defences .....	E4-4
 CIRCUMSTANTIAL EVIDENCE .....	 E5-1
Introduction .....	E5-1
Admissibility of Circumstantial Evidence .....	E5-1
Probative Weight .....	E5-2
Rule in Hodge's Case .....	E5-2
 CROSS-EXAMINATION .....	 E6-1
Introduction .....	E6-1
Provincial Offences Act .....	E6-1
Scope of Cross-Examination .....	E6-1
Ordinary Rules of Evidence Apply .....	E6-1
Judicial Interference .....	E6-1
Who May Cross-Examine .....	E6-2
Sequence of Cross-Examinations .....	E6-3
Cross-Examination on Prior Inconsistent Statement .....	E6-3
Procedure for Prior Inconsistent Statements .....	E6-6
Cross-Examination of Defendant on Prior Testimony .....	E6-7
Cross-Examination on Documents .....	E6-7
Cross-Examination of Own Witness .....	E6-8
Cross-Examination as to Previous Convictions .....	E6-8
What is "Conviction" for Purposes of Cross-Examination .....	E6-9
Previous Convictions not to Include Provincial Offences .....	E6-10
Discretion to Disallow Questions to Defendant as to Convictions .....	E6-10
Procedure for Cross-Examination as to Convictions .....	E6-11
Cross-Examination of Defendant on Discreditable Conduct .....	E6-11
Rule Against Rebuttal on Collateral Issues .....	E6-11
Cross-Examination on Documents used to Refresh Memory .....	E6-12
Requirement of Cross-Examination if Contradiction Planned .....	E6-12
Witness Not to Comment on Veracity of Other Witness .....	E6-13
Suggestions for Cross-Examination .....	E6-13

DOCUMENTARY EVIDENCE .....	E7-1
Introduction .....	E7-1
Ontario Evidence Act .....	E7-1
Authenticity .....	E7-1
Use of Documentary Evidence in Court .....	E7-2
The Best Evidence Rule .....	E7-2
Exceptions to the Best Evidence Rule .....	E7-3
Statutory Exceptions to the Best Evidence Rule .....	E7-4
The Hearsay Rule .....	E7-4
Common Law Exceptions to the Hearsay Rule .....	E7-5
Statutory Exceptions to the Hearsay Rule .....	E7-6
Business Records .....	E7-6
Original Evidence .....	E7-8
Accountant's Summary of Exhibits .....	E7-9
Judicial Documents .....	E7-10
Cross-Examination on Documents .....	E7-10
Copies of Documents .....	E7-10
Documents Filed under Highway Traffic Act .....	E7-10
 EXAMINATION-IN-CHIEF .....	 E8-1
Introduction .....	E8-1
Provincial Offences Act .....	E8-1
Purpose .....	E8-1
Leading Questions .....	E8-1
Exceptions to the Rule Against Leading Questions .....	E8-1
Residual Discretion of Court .....	E8-3
Suggestions for Examination-in-Chief .....	E8-3
Defendant Must be Given an Opportunity to Testify in Chief .....	E8-5
Defendant's Absolute Right to Call a Witness .....	E8-5
 EXCEPTIONS, EXEMPTIONS, AUTHORIZATIONS, OR QUALIFICATIONS .....	 E9-1
Introduction .....	E9-1
Statutory Provisions .....	E9-1
Scope of the Rule .....	E9-1
Examples .....	E9-2
Burden of Proof .....	E9-4
Satisfying the Burden of Proof .....	E9-4
Application to General Defences .....	E9-4
Reasonable Excuse .....	E9-5
Charter Issues .....	E9-5

# TABLE OF CONTENTS

xix

HEARSAY .....	E10-1
Introduction .....	E10-1
Definition .....	E10-1
Rationale for the Rule .....	E10-2
Application of the Rule .....	E10-3
Admissibility for Limited Purpose .....	E10-3
Conduct as Hearsay .....	E10-3
Implied Assertions .....	E10-4
Negative Matters .....	E10-5
Reasonable Grounds .....	E10-6
Use of Interpreters .....	E10-6
Prior Statements .....	E10-6
Non-Hearsay Use of Words .....	E10-7
Common Law Exceptions to the Hearsay Rule .....	E10-8
Admissions by Party .....	E10-9
Dying Declarations .....	E10-11
Statements about Contemporaneous Physical or Mental Condition ..	E10-11
Declarations of State of Mind or Intention .....	E10-11
Declarations Against Interest .....	E10-13
Evidence of Prior Identification .....	E10-15
Evidence of Age .....	E10-16
Measuring Devices and Scientific Instruments .....	E10-16
Observations Recorded by Others: The "Licence Plate Problem" ...	E10-17
Constitutional Exceptions .....	E10-17
New Exceptions .....	E10-18

IDENTIFICATION .....	E11-1
Introduction .....	E11-1
Proving Defendant was Person Charged .....	E11-1
Description as "Defendant" .....	E11-4
Direct Identification of Offender .....	E11-4
Opportunity to Perceive and Recall .....	E11-5
Line-ups .....	E11-7
Photographs .....	E11-7
Identification in Court .....	E11-9
Effect of Improper Identification Techniques .....	E11-9
Discrepancies in Description .....	E11-10
Circumstantial Evidence Supporting Identification .....	E11-10
Effect of Prior Failure to Identify .....	E11-11
Expert Evidence on Identification Evidence .....	E11-11
Identification of Offender in Videotape .....	E11-11
Drawings .....	E11-12
Voice Identification .....	E11-12
Other Methods of Identification .....	E11-13
Evidence of Prior Description or Identification .....	E11-13
Identification and Res Gestae .....	E11-14
 JUDICIAL NOTICE .....	 E12-1
Introduction .....	E12-1
The General Principle .....	E12-1
Matters of General Knowledge .....	E12-2
Reference to Sources of Unquestioned Accuracy .....	E12-2
Procedure for taking Judicial Notice .....	E12-3
Effect of Judicial Notice .....	E12-4
Examples Where Judicial Notice of Fact Taken .....	E12-4
Examples Where Judicial Notice of Fact Not Taken .....	E12-4
Radar Devices .....	E12-5
Geography and Territorial Jurisdiction .....	E12-5
Judicial Notice of Law .....	E12-6
Regulations .....	E12-6
Bylaws .....	E12-7
Foreign Law .....	E12-7
Judicial Notice of Law Not Yet in Force .....	E12-8

OPINION EVIDENCE .....	E13-1
Introduction .....	E13-1
Opinions of Lay Witnesses .....	E13-1
Examples Where Lay Opinion Permitted .....	E13-2
Admissibility of Expert Opinion .....	E13-3
Examples where Expert Opinion Allowed .....	E13-4
Examples where Expert Opinion Not Allowed .....	E13-5
Expert Evidence on Matters of Law .....	E13-6
Expert Opinion on Credibility .....	E13-7
Who May Give Expert Opinion Evidence .....	E13-8
Examples of Persons Qualified as Experts .....	E13-8
Examples of Persons Not Qualified as Experts .....	E13-9
Persons Operating Scientific Instruments .....	E13-9
Adducing Expert Opinion .....	E13-9
Qualifying Opponent's Witness as Expert .....	E13-11
Maximum Number of Experts .....	E13-11
Factual Basis of Expert Opinion .....	E13-12
Use of Textbooks .....	E13-13
Hypothetical Questions .....	E13-14
Opinion as to Ultimate Issue .....	E13-14
Cross-Examination of Experts .....	E13-15
Evaluation of Expert Opinion .....	E13-17
 PHOTOGRAPHS, FILM AND VIDEOTAPE .....	 E14-1
Introduction .....	E14-1
Purposes of Photographic Evidence .....	E14-1
Technical Criteria for Admissibility .....	E14-2
Discretion of Trial Judge .....	E14-3
Examples of Photographs Admitted .....	E14-4
Colour Photographs .....	E14-5
Film and Videotape .....	E14-5
Photos Found in Possession of Defendant .....	E14-6

REASONABLE DOUBT .....	E15-1
Introduction .....	E15-1
Definition .....	E15-1
Proof to a Moral Certainty .....	E15-2
Beyond any Peradventure of Doubt or Beyond Any Shadow of a Doubt .....	E15-3
Existence of Possibilities .....	E15-3
Prima Facie Case .....	E15-3
Test Applies to Elements of Offence .....	E15-4
Application to Credibility .....	E15-4
Evidence of Defence Witnesses .....	E15-5
 RE-EXAMINATION .....	 E16-1
Introduction .....	E16-1
Right of Re-Examination .....	E16-1
Scope of Re-Examination .....	E16-1
Leading Questions .....	E16-2
Prior Consistent Statements .....	E16-2
Prior Inconsistent Statement .....	E16-2
Admittance of Prejudicial Information .....	E16-3
Re-Cross-Examination .....	E16-3
 REFRESHING MEMORY .....	 E17-1
Introduction .....	E17-1
Methods of Using Notes .....	E17-1
Prerequisites for Use of Notes .....	E17-1
Examples of Past Recollection Recorded .....	E17-3
Qualifying Notes .....	E17-3
Prior Use of Notes .....	E17-4
Use of Copies of Notes .....	E17-4
Use of Transcriptions of Notes .....	E17-5
Use of Notes Prepared by Others .....	E17-5
Use of Notes Prepared Jointly .....	E17-5
Use of Tape Recordings .....	E17-6
Entering Material as Exhibit .....	E17-6
Refreshing Memory from Transcripts of Earlier Hearing .....	E17-6
Use of Inadmissible Evidence to Refresh Memory .....	E17-7
The "Licence Plate" Problem .....	E17-8
Production of Documents used to Refresh Memory .....	E17-9
Production and Claims of Privilege .....	E17-10



RELEVANCE .....	E18-1
Introduction .....	E18-1
Meaning of Relevance .....	E18-1
Relevance and Admissibility .....	E18-1
Relevance and Probative Weight .....	E18-2
Relevance on Multiple Grounds .....	E18-2
Conditional Relevance .....	E18-3
Discretion to Exclude Relevant Evidence .....	E18-3
 RE-OPENING THE CASE .....	 E19-1
Introduction .....	E19-1
Discretion of the Trial Judge .....	E19-1
Test for Re-Opening .....	E19-2
Conduct of Defence Counsel .....	E19-2
Timing of Motion .....	E19-3
Evidence by Defence Following Re-Opening .....	E19-3
Re-Opening of Voir Dire .....	E19-3
New Evidence .....	E19-4
Re-Opening the Defence .....	E19-4
Examples of Re-Opening .....	E19-4
 REPLY EVIDENCE .....	 E20-1
Introduction .....	E20-1
The General Principle .....	E20-1
Discretion to Permit Reply Evidence .....	E20-2
Elements of the Offence .....	E20-2
Defence Broadening Issues .....	E20-3
Evidence Rebutting Defence Evidence .....	E20-3
Evidence Rebutting Alibi .....	E20-4
Effect of Presumption .....	E20-5
Reply Evidence on Collateral Matters .....	E20-5
Evidence of Bad Character .....	E20-6
Sur-Rebuttal Evidence .....	E20-6
Failure of Lawyer to Object .....	E20-7

RES GESTAE .....	E21-1
Introduction .....	E21-1
Admissibility of <i>Res Gestae</i> Statements .....	E21-1
Definition of <i>Res Gestae</i> .....	E21-2
What Constitutes "Transaction" .....	E21-2
Requirements for Admissibility .....	E21-3
Contemporaneity and Spontaneity .....	E21-3
Exceptions to Contemporaneity Rule .....	E21-4
Relaxed Rules of Contemporaneity for Children .....	E21-5
Use of Statement for Purposes of Identification .....	E21-5
On a Possession Charge .....	E21-5
 STATEMENTS .....	 E22-1
Introduction .....	E22-1
Person in Authority .....	E22-1
The Purpose of a Voir Dire .....	E22-3
Voir Dire on Exculpatory and Inculpatory Statements .....	E22-4
No Necessity for a Voir Dire .....	E22-4
Procedure in a Voir Dire .....	E22-4
Written Statements .....	E22-5
Use of Statement by Crown .....	E22-5
Use of Statement by Accused .....	E22-6
Fear or Prejudice .....	E22-7
Threats or Intimidation .....	E22-8
Inducements .....	E22-9
Oppression .....	E22-9
Statements Obtained by Trickery .....	E22-10
Defendant's State of Mind .....	E22-10
Language Difficulties .....	E22-10
The Reading of an Accused's Rights .....	E22-11
Statements Made under Statutory Compulsion .....	E22-11
Series of Statements .....	E22-11
Statements Made by Co-conspirators .....	E22-11
Statements Made by Co-Accused/ and Others in the Presence of the Accused .....	E22-12
Confirmation by Subsequent Facts .....	E22-13



**ANNOTATIONS**

BUSINESS PRACTICES ACT .....	A1-1
COMPULSORY AUTOMOBILE INSURANCE ACT .....	A2-1
DOG OWNERS' LIABILITY ACT .....	A3-1
GAME AND FISH ACT .....	A4-1
HIGHWAY TRAFFIC ACT .....	A5-1
LIQUOR LICENCE ACT .....	A6-1
TRESPASS TO PROPERTY ACT .....	A7-1
MOTORIZED SNOW VEHICLES' ACT .....	A8-1

**STATUTES**

CHARTER OF RIGHTS AND FREEDOMS .....	S1-1
EVIDENCE ACT (ONTARIO) .....	S2-1
INTERPRETATION ACT (ONTARIO) .....	S3-1
PROVINCIAL OFFENCES ACT .....	S4-1
REGULATIONS ACT (ONTARIO) .....	S5-1

**TABLE OF CONTENTS**

TABLE OF CASES .....	TC1 to TC28
----------------------	-------------







## TABLE OF CONTENTS

GENERAL PRINCIPLES  
AND DEFENCES

ABUSE OF PROCESS .....	G1-1
Introduction .....	G1-1
Definition of Abuse of Process .....	G1-1
Burden of Proof .....	G1-2
Applicability to Provincial Offences .....	G1-2
Need for State Involvement .....	G1-2
Relevance of Motive .....	G1-3
Timing .....	G1-3
Examples Where Abuse of Process Found .....	G1-3
Examples Where Abuse of Process Not Found .....	G1-3
Not as a Defence .....	G1-4
 CONTEMPT OF COURT .....	 G2-1
Introduction .....	G2-1
Statutory Provisions .....	G2-1
Definition of Contempt .....	G2-1
Forms of Contempt .....	G2-1
Jurisdiction of Provincial Judge .....	G2-2
Jurisdiction of Justice of the Peace .....	G2-2
Initiation of Proceedings .....	G2-3
Procedure on Contempt Hearing .....	G2-3
Mental Element for Contempt .....	G2-5
Propriety of Judge Hearing Own Contempt Proceeding .....	G2-5
Whether Failure of Counsel to Appear Contempt .....	G2-5
Examples of Contempt in the Face of the Court .....	G2-6
Sentence for Contempt .....	G2-7
Barring Counsel and Others from Appearing .....	G2-7
Disturbances Outside the Courtroom .....	G2-8
Charter .....	G2-8
Power to Exclude Persons from Courtroom .....	G2-8

RIGHT TO COUNSEL .....	G3-1
Introduction .....	G3-1
Provincial Offences Act .....	G3-1
Defendant's Right to Counsel--Pre Charter .....	G3-1
S.10(b) Right to Counsel under the Charter .....	G3-2
When is a Defendant Arrested or Detained? .....	G3-2
Informing the Defendant of His Right to Retain and Instruct Counsel .....	G3-3
Change in Circumstances .....	G3-4
Duty to Inform Defendant of Availability of Legal Aid .....	G3-5
Reasonable Opportunity to Retain Counsel .....	G3-5
Duty Not to Question Defendant .....	G3-5
Unavailability of Counsel .....	G3-6
Withdrawal of Defence Counsel by Defendant .....	G3-6
Withdrawal by Defence Counsel .....	G3-6
Counsel Who is Absent at Trial .....	G3-7
Remedy .....	G3-7
 DEFENCES: GENERAL PRINCIPLES .....	 G4-1
Introduction .....	G4-1
Statutory Provisions .....	G4-1
Availability for Offences of Strict and Absolute Liability .....	G4-1
Onus of Proof .....	G4-2
 DEFENCES: DE MINIMIS .....	 G5-1
Introduction .....	G5-1
Criminal Offences .....	G5-1
Provincial Offences .....	G5-1
Careless Driving .....	G5-2
 DEFENCES: IMPOSSIBILITY .....	 G6-1
Introduction .....	G6-1
The Law in England .....	G6-1
The Law in Canada .....	G6-1

MISTAKE OF LAW AND OFFICIALLY INDUCED ERROR .....	G7-1
Introduction .....	G7-1
Provincial Offences Act .....	G7-1
Meaning of "Mistake of Law" .....	G7-1
Non-Publication of Regulation .....	G7-2
Due Diligence in Ascertaining Law .....	G7-2
Effect on Sentence .....	G7-3
Officially Induced Error .....	G7-3
 DEFENCES: NECESSITY .....	 G8-1
Introduction .....	G8-1
Nature of the Defence .....	G8-1
Availability for Provincial Offences .....	G8-1
Urgent and Imminent Peril .....	G8-1
Nature of Harm Threatened .....	G8-2
Creation of Situation of Necessity .....	G8-2
Availability of Alternatives .....	G8-3
 JUSTICE OF THE PEACE .....	 G9-1
Introduction .....	G9-1
Provincial Offences Act .....	G9-1
Powers and Duties of a Justice of the Peace .....	G9-1
Role of Justice when Adjudicating Provincial Offences Court .....	G9-2
Allowing Counsel for the Defendant to Present Argument .....	G9-2
Discussions with Counsel .....	G9-3
The Right of a Justice/Judge to ask Questions in Court .....	G9-3
Protecting Witnesses .....	G9-4
The Right of a Justice/Judge to Call Witnesses .....	G9-4
Restoring Order/Preventing Disorder .....	G9-4
Right of Justice to Raise Charter Issues .....	G9-5
Stare Decisis .....	G9-5
Independent and Impartial .....	G9-5
Functus Officio .....	G9-5
 ONTARIO COURT (PROVINCIAL DIVISION) .....	 G10-1
Introduction .....	G10-1
Statutory Provisions .....	G10-1
Presiding Judge .....	G10-1

PARTIES TO AN OFFENCE .....	G11-1
Introduction .....	G11-1
Provincial Offences Act .....	G11-1
Aiding and Abetting .....	G11-1
Abet Defined .....	G11-2
Counselling Defined .....	G11-2
Procure Defined .....	G11-2
Common Intention/Purpose .....	G11-3
Accused Tried Alone .....	G11-3
Secondary Offenders in Driving Offences .....	G11-4
PROSECUTOR .....	G12-1
Introduction .....	G12-1
Provincial Prosecutors .....	G12-1
Crown Counsel's Authority .....	G12-2
Duty of: .....	G12-2
Prosecutorial Discretion .....	G12-3
Personal Opinions .....	G12-3
Denial of Crown's Right to Fair Trial .....	G12-3
Calling of Witnesses .....	G12-3
Stay of Proceedings .....	G12-4
THE RULE AGAINST MULTIPLE CONVICTIONS .....	G13-1
Introduction .....	G13-1
Distinguished from other double jeopardy concepts .....	G13-1
Interpretations of the Rule .....	G13-1
The rule after <b>Prince</b> .....	G13-2
STARE DECISIS .....	G14-1
Introduction .....	G14-1
Principle to Stare Decisis .....	G14-1
Extent to which Decision Binding .....	G14-1
Unreported Decisions .....	G14-1
Courts of Co-Ordinate Jurisdiction .....	G14-2
Decisions of Higher Courts .....	G14-2
Decisions of Higher Courts in Other Counties .....	G14-3
Conflicting Decisions .....	G14-3
Higher Courts in Other Provinces .....	G14-3
Refusal of Leave to Appeal .....	G14-3
Ontario Court of Appeal .....	G14-4
Supreme Court of Canada .....	G14-4



STRICT/ABSOLUTE LIABILITY .....	G15-1
Introduction .....	G15-1
Definition of Strict Liability Offences .....	G15-1
Due Diligence/Mistake of Fact .....	G15-1
Examples .....	G15-2
Other Defences to Strict Liability Offences .....	G15-2
Party to a Strict Liability Offence .....	G15-3
Definition of Absolute Liability Offences .....	G15-3
Test to Determine Whether Strict or Absolute Liability .....	G15-4
Wording of Absolute Liability Offence .....	G15-4
Defences to Absolute Liability Offences .....	G15-5
Defences to Mens Rea Offences .....	G15-5



## ABUSE OF PROCESS

### Introduction

Abuse of process has long been part of civil law, but has only recently emerged definitively as a part of the criminal law. While the existence of abuse of process is now beyond challenge, its contours are still being developed. Earlier cases, particularly those decided before the unequivocal recognition of the doctrine by the Supreme Court of Canada in **R. v. Jewitt** in 1985, must be approached with caution. As well, the distinction between the stay of proceedings as a remedy for a **Charter** violation and the stay of proceedings as a remedy for abuse of process must be kept in mind (although there will often be an overlap between the rights protected by the **Charter** and those protected by the doctrine of abuse of process).

### Definition of Abuse of Process

A trial court has a residual discretion to stay criminal proceedings for abuse of process where compelling a defendant to stand trial would violate those fundamental principles of justice which underlie a community's sense of fair play and decency, or where the proceedings are oppressive or vexatious proceedings.

R. v. Jewitt, [1985] 2 S.C.R. 128, 21 C.C.C. (3d) 7

R. v. Keyowski, [1988] 1 S.C.R. 657, 40 C.C.C. (3d) 481

R. v. Scott (1991), 61 C.C.C. (3d) 300, 2 C.R. (4th) 153 (S.C.C.)

However, not every instance of unfairness will give rise to an abuse of process. The test is whether the affront to fair play and decency is disproportionate to the societal interest in the effective operation of the criminal law. If the conduct meets this threshold, then the administration of justice is best served by staying the proceedings against the defendant.

R. v. Young (1984), 13 C.C.C. (3d) 1, 40 C.R. (3d) 289 (Ont. C.A.)

R. v. Conway [1989], 1 S.C.R. 1659, 49 C.C.C. (3d) 289

R. v. MacDonald (1990), 54 C.C.C. (3d) 97, 75 C.R. (3d) 238 (Ont. C.A.),  
leave to appeal to S.C.C. refused (1991), 3 C.R. (4th) 276n

The power to stay proceedings for an abuse of process will only be exercised "in the clearest of cases". Such cases will be rare.

R. v. Jewitt, [1985] 2 S.C.R. 128, 21 C.C.C. (3d) 7 (S.C.C.)

R. v. Conway, [1989] 1 S.C.R. 1659, 49 C.C.C. (3d) 289, 70 C.R. (3d) 209 (S.C.C.)

R. v. MacDonald (1990), 54 C.C.C. (3d) 97, 75 C.R. (3d) 238 (Ont. C.A.),  
leave to appeal to S.C.C. refused (1991), 3 C.R. (4th) 276n

R. v. Scott (1991), 61 C.C.C. (3d) 300, 2 C.R. (4th) 153 (S.C.C.)

### Burden of Proof

Claims of abuse of process are highly fact-specific. The court must consider the facts established by the person claiming abuse of process, and then apply the test outlined above to determine whether the claim of abuse of process has been made out.

The burden is on the defendant to establish the factual foundation for the alleged abuse of process. The test is the civil standard of proof on a balance of probabilities.

R. v. W.G.G. (1990), 57 C.C.C. (3d) 151 (Ont. C.A.)

R. v. Livingstone (1990), 57 C.C.C. (3d) 449 (B.C.S.C.)

Once this has been done, the burden then lies on the defendant to satisfy the court, on a balance of probabilities, that the test set out above has been met.

R. v. Mack (1988), 44 C.C.C. (3d) 513 (S.C.C.)

R. v. D.(T.C.) (1987), 38 C.C.C. (3d) 434 (Ont. C.A.)

R. v. Miles of Music Ltd. (1989), 48 C.C.C. (3d) 96 (Ont. C.A.)

### Applicability to Provincial Offences

A trial court, whether it is a superior or inferior court, may stay a proceeding for abuse of process.

R. v. Jewitt, [1985] 2 S.C.R. 128, 21 C.C.C. (3d) 7, 47 C.R. (3d) 193

Presumably a justice of the peace presiding over a **Provincial Offences Act** matter in the Ontario Court (Provincial Division) would also have this power. While there may be good reasons for restricting the powers of a justice of the peace in matters unfavourable to the liberty of the subject (see "Contempt of Court", *infra*), it would be incongruous, and perhaps unconstitutional, to limit a defendant's protections from abuse of process on the basis of the status of the judicial official presiding over the court.

### Need for State Involvement

While the doctrine of abuse of process is not limited solely to executive (i.e. police or Crown) action, there must at least be some knowing participation by the police or the Crown in the acts alleged to be abusive.

R. v. Miles of Music Ltd. (1989), 48 C.C.C. (3d) 96 (Ont. C.A.)

## Relevance of Motive

Abuse of process is not limited to situations where there is an improper motive or wilful misconduct by the prosecution.

R. v. Keyowski, [1988] 1 S.C.R. 657, 40 C.C.C. (3d) 481 (S.C.C.)

However, the motive for the actions of the Crown is clearly a relevant factor in determining whether an abuse of process has been established. Motive is not only relevant as a negative factor: the good faith of the Crown is relevant when an action that might otherwise give rise to an appearance of an abuse of process is being assessed.

R. v. Scott (1991), 61 C.C.C. (3d) 300, 2 C.R. (4th) 153 (S.C.C.)

It seems that the court can review, and hear evidence about, the actions and motivations of police and Crowns in determining whether an abuse of process has been established.

R. v. Deviney (1990), 1 O.R. (3d) 69 (Ont. Gen. Div.)

## Timing

It seems that a stay may be granted at any time up to, but not after, conviction. A stay of proceedings may be entered after a finding of guilt, but before conviction, since the guilt of the defendant is not a bar to the entry of a stay for abuse of process.

R. v. Mack (1988), 44 C.C.C. (3d) 513 (S.C.C.)

R. v. Gostick (1991), 62 C.C.C. (3d) 276 (Ont. C.A.)

## Examples Where Abuse of Process Found

1. Where the Crown failed to give disclosure to the defence, thereby withholding documentary evidence which could have reasonably been expected to contain information that could have enabled the defence to either advance its own case, or destroy the case for the Crown.

R. v. Livingstone (1990), 57 C.C.C. (3d) 449 (B.C.S.C.)

2. Where a defendant and the Crown enter into an agreement whereby the defendant provides material prejudicial to himself, and the Crown subsequently repudiates the agreement and seeks to proceed against the defendant.

Re Smith and R. (1974), 22 C.C.C. (2d) 268, 30 C.R.N.S. 383 (B.C.S.C.)

R. v. Crneck (1980), 55 C.C.C. (2d) 1 (Ont. H.C.)

## Examples Where Abuse of Process Not Found

1. Where a police officer formed the opinion that there were reasonable and probable grounds to lay a charge after having been given that advice by the

Ministry of the Attorney General, despite an internal divergence of views among senior and experienced Crown counsel as to the existence of such grounds.

R. v. Deviney (1990), 1 O.R. (4th) 69 (Ont. Gen. Div.)

2. Where the Crown agrees not to prosecute a defendant if he gives a truthful statement to the police about his involvement in the alleged offence, and later lays charges once it was revealed that the defendant's statement was not complete and truthful.

R. v. MacDonald (1990), 54 C.C.C. (3d) 97, 75 C.R. (3d) 238 (Ont. C.A.),  
leave to appeal to S.C.C. refused (1991), 3 C.R. (4th) 276n

3. Where a third trial is sought to be held as a result of appellate reversals or hung juries in earlier trials.

R. v. Keyowski, [1988] 1 S.C.R. 657, 40 C.C.C. (3d) 481 (S.C.C.)

R. v. Conway, [1989] 1 S.C.R. 1659, 49 C.C.C. (3d) 289 (S.C.C.)

4. Where a proceeding is stayed by the Crown in order to prevent the identity of an informant being revealed as a result of an incorrect legal ruling by the trial judge, and subsequently the proceeding is recommenced.

R. v. Scott (1991), 61 C.C.C. (3d) 300, 2 C.R. (4th) 153 (S.C.C.)

5. Where charges of sexual assault on children were not laid when the circumstances first came to light because of the complainants' reluctance, but were commenced some four years later. While there had been contact between the accused and the police at the time the matters first came to light, the defence failed to establish that there had been a specific agreement that no charges would be laid, and there was no indication that the accused had suffered any prejudice by the delay.

R. v. D.(E.) (1990), 57 C.C.C. (3d) 151 (Ont. C.A.)

6. Where the physical environment in the courtroom made it uncomfortable for the trier of fact but did not impair the trier of fact's abilities to carry out its duties.

R. v. Gostick (1991), 62 C.C.C. (3d) 276 (Ont. C.A.)

### **Not as a Defence**

The doctrine of abuse of process operates by way of a stay of proceedings and not as a substantive defence.

R. v. Mack (1988), 44 C.C.C. (3d) 513 (S.C.C.)



## CONTEMPT OF COURT

### Introduction

The power to punish for contempt of court is an important tool in the court's control over proceedings before it.

The law of contempt is not designed to protect a specific judicial official but rather to ensure that the administration of justice is independent and free from intimidation or interference by improper conduct. The power must be used cautiously and sparingly.

The law of contempt of court under the **Provincial Offences Act** is complicated by the different powers and procedures that apply. These depend on whether the court is presided over by a provincial judge or a justice of the peace.

### Statutory Provisions

See the **Courts of Justice Act**, R.S.O. 1990, c. C.43, ss. 39(2), 41 and the **Provincial Offences Act**, s. 91.

### Definition of Contempt

Contempt of court encompasses any act that is calculated to bring the court into contempt or to lower its authority, or that is calculated to obstruct or interfere with the due course of justice or the process of the courts.

R. v. Gray, [1900] 2 Q.B. 86 (C.A.)

R. v. Cohn (1984), 15 C.C.C. (3d) 150, 42 C.R. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused (1986), 9 O.A.C. 160

### Forms of Contempt

There are two broad categories of contemptuous conduct: contempt in the face of the court (contempt *in facie curiae*) and contempt committed outside court (contempt *ex facie curiae*). Contempt in the face of the court encompasses acts done within the courtroom, or acts done outside the courtroom that immediately affect proceedings within the courtroom.

R. v. Cohn (1984), 15 C.C.C. (3d) 150, 42 C.R. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused (1986), 9 O.A.C. 160



It seems that events that take place in the courtroom but outside the presence of the judge may constitute contempt *in facie*.

R. v. Larue-Langlois (1970), 14 C.R.N.S. 68 (Que. C.A.)

However, acts that take place entirely outside the courtroom and that do not immediately affect proceedings inside the courtroom will not constitute contempt in the face of the court.

R. v. Vermette (1987), 32 C.C.C. (3d) 519, 57 C.R. (3d) 340 (S.C.C.)

Because of the wording of s. 91 of the **Provincial Offences Act**, it may be that a justice of the peace (unlike a provincial judge) has no power to deal with acts that take place outside the courtroom but that affect the proceedings in court. However, s. 41 of the **Courts of Justice Act** creates a statutory offence covering such conduct.

### Jurisdiction of Provincial Judge

The Ontario Court (Provincial Division) is an inferior court of record, even when hearing matters under the **Provincial Offences Act**. A *provincial judge* presiding over an inferior court of record has an inherent power to punish for contempt in the face of the court.

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 38(2)

R. v. Dunning (1979), 50 C.C.C. (2d) 296 (Ont. C.A.)

R. v. Fields (1986), 28 C.C.C. (3d) 353, 53 C.R. (3d) 260 (Ont. C.A.)

However, an inferior court has no jurisdiction to deal with contempt not in the face of the court.

C.B.C. v. Cordeau, [1979] 2 S.C.R. 618, 48 C.C.C. (2d) 289 (S.C.C.)

### Jurisdiction of Justice of the Peace

It is doubtful whether, at common law, a justice of the peace had any inherent power to punish contempt, even in the face of the court.

Young v. Saylor (1893), 23 O.R. 513 (Ont. C.A.)

Re Reiben (1920), 30 C.C.C. 271 (Sask. K.B.)

This issue is now resolved by s. 91 of the **Provincial Offences Act**, which gives a justice of the peace presiding in the Ontario Court (Provincial Division) certain powers to deal with contempt in the face of the court. The effect of this section seems to be that a justice of the peace hearing a provincial offences matter has the same power to deal with contemptuous acts within the courtroom as a provincial judge.

## Initiation of Proceedings

Proceedings for contempt in the face of the court may be commenced in one of three ways:

- (i) an oral citation for contempt, which should be dealt with at once or after allowing the alleged contemnor a short period of time to obtain counsel;
- (ii) an oral citation to the alleged contemnor to appear in court at a specific time to show cause why he should not be cited for contempt;
- (iii) a written citation to the alleged contemnor directing him to appear in court to answer the charge against him.

R. v. Cohn (1984), 15 C.C.C. (3d) 150, 42 C.R. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused (1986), 9 O.A.C. 160

If the court is presided over by a justice of the peace, the contempt proceeding must be adjourned to another day unless immediate action is necessary for the preservation of order and control in the courtroom. Where the proceeding is adjourned, it must be heard and determined by a provincial judge.

Provincial Offences Act, ss. 91(4)(5)

A provincial judge may not adjourn a contempt proceeding to another day to be heard by a different judge.

R. v. Doz (1987), 38 C.C.C. (3d) 479 (S.C.C.) rev'g (1985), 19 C.C.C. (3d) 434 (Alta. C.A.)

Presumably, the judge must adjourn the application over to be heard either by him or herself (subject to the discussion below) or by a judge of the Ontario Court (General Division).

## Procedure on Contempt Hearing

A citation for contempt should give the alleged contemnor notice that he is being cited for contempt, as well as notice of the specific conduct constituting the alleged offence

R. v. Carter (1975), 28 C.C.C. (2d) 219 (Ont. C.A.)

However, it seems that notice of the specific acts is not necessary where the defendant is clearly aware of the conduct that is alleged to be contemptuous.

R. v. Doz (1985), 19 C.C.C. (3d) 434 (Alta. C.A.) rev'd on other grounds (1987), 38 C.C.C. (3d) 479 (S.C.C.)

The defendant should be informed of his right to show cause why he should not be punished for contempt. He should be informed of his rights to give evidence under

oath, to refuse to answer questions put by the court, to call witnesses and to request an adjournment.

R. v. Traynor (1982), 7 W.C.B. 232 (Ont. C.A.)

R. v. Cohn (1984), 15 C.C.C. (3d) 150, 42 C.R. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused (1986), 9 O.A.C. 160

The court must inform a defendant cited for contempt of his rights under s. 10(b) of the **Charter**.

R. v. M.(S.) (1987), 40 C.C.C. (3d) 242 (N.S.C.A.)

A person cited for contempt is entitled to an adequate opportunity to consult with counsel and, absent exceptional circumstances, should be given an adjournment in order to do so.

R. v. Ayres (1984), 42 C.R. (3d) 33 (Ont. C.A.)

A contempt hearing must be conducted according to the rules of natural justice and the rights guaranteed in the **Charter**. Where the conduct alleged to constitute contempt does not appear in the record (such as a gesture), it may be necessary for the prosecution to call evidence. However, where the allegedly contemptuous conduct appears on the record, the situation is analogous to one where the prosecution has established a *prima facie* case, and the evidentiary onus shifts to the alleged contemnor.

R. v. Cohn (1984), 15 C.C.C. (3d) 150, 42 C.R. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused (1986), 9 O.A.C. 160

R. v. Doz (1985), 19 C.C.C. (3d) 434 (Alta. C.A.), rev'd on other grounds (1987), 38 C.C.C. (3d) 479 (S.C.C.)

Where the contempt hearing takes place before a judge other than the judge before whom the alleged contempt took place, the onus is on the Crown to lead evidence establishing the contempt.

R. v. Doz (1985), 19 C.C.C. (3d) 434 (Alta. C.A.), rev'd on other grounds (1987), 38 C.C.C. (3d) 479 (S.C.C.)

Presumably, this could be done by tendering a transcript as well as by oral evidence.

Where a defendant is not in a fit state to defend himself because of intoxication, the hearing should be adjourned.

R. v. Jolly (1990), 57 C.C.C. (3d) 389 (B.C.C.A.)

The onus of proof at a contempt hearing is proof beyond a reasonable doubt.

R. v. Pereira (unreported, Ontario C.A., Sept 22, 1983)

R. v. Cohn (1984), 15 C.C.C. (3d) 150, 42 C.R. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused (1986), 9 O.A.C. 160

## Mental Element for Contempt

The issue of the mental element for contempt in the face of the court is a difficult one. It seems that if the acts clearly interfere with the administration of justice, the only intent necessary is an intent to bring the acts about. Where the conduct is equivocal, an intent to show disrespect for, or interfere with, the operation of the court or the administration of justice must be shown.

R. v. Barker (1980), 53 C.C.C. (2d) 322 (Alta. C.A.)

R. v. Kopyto (1981), 60 C.C.C. (2d) 85, 21 C.R. (3d) 276 (Ont. C.A.)

## Propriety of Judge Hearing Own Contempt Proceeding

A judge (or justice subject to s.91(4) of the **Provincial Offences Act.**) who commences contempt proceedings may appropriately hear and determine contempt proceedings where the facts are clear and unequivocal. The judge (or justice) before whom the alleged contempt was committed should generally not preside at the contempt proceedings where the conduct alleged consists of insolent or contemptuous behaviour or other disorderly conduct or behaviour that reflects adversely upon the character, integrity or reputation of the judge instigating the contempt proceeding, since this may infringe upon the contemnor's right to be tried by an independent and impartial tribunal under s. 11(d) of the **Charter**. However, in exceptional cases where there is a compelling need to preserve order and protect the authority of the court, the presiding judge may try the contempt proceeding.

R. v. Cohn (1984), 15 C.C.C. (3d) 150, 42 C.R. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused (1986), 9 O.A.C. 160

R. v. Martin (1985), 19 C.C.C. (3d) 248 (Ont. C.A.)

## Whether Failure of Counsel to Appear Contempt

The failure of counsel who has been retained to be present when a case is called is *prima facie* contempt of court.

Barrette v. R. (1976), 29 C.C.C. (2d) 189, 33 C.R.N.S. 377 (S.C.C.)

A lawyer who wilfully fails to obey a judge's order to appear in court at a certain time may be found in contempt.

R. v. Hill (1976), 33 C.C.C. (2d) 60, 37 C.R.N.S. 380 (B.C.C.A.)

A counsel who fails to appear in court because he is "double booked", and who fails to make reasonable efforts to resolve the conflict or have another counsel attend, may (but not necessarily must) be found in contempt.

R. v. Anders (1982), 25 C.R. (3d) 12 (Ont. Co. Ct.), *aff'd*



(1982), 67 C.C.C. (2d) 138 (Ont. C.A.)

R. v. Bickerton (1985), 46 C.R. (3d) 286 (Ont. H.C.)

A lawyer who fails to attend court through inadvertence (ie. honestly forgetting), or who has a justifiable excuse, will not necessarily be in contempt.

R. v. Jones (1978), 42 C.C.C. (2d) 192 (Ont. C.A.)

R. v. McLachlan and Lockyer (1980), 62 C.C.C. (2d) 188, 17 C.R. (3d) 312 (Ont. H.C.)

A lawyer who attempts to withdraw from a case and indicates he is going to leave the courtroom after an adverse ruling will not necessarily be in contempt.

R. v. Swartz (1977), 34 C.C.C. (2d) 477 (Man.C.A.)

A counsel who is merely discourteous in that he is late arriving for some explicable reason will not be in contempt.

R. v. Fox (1976), 30 C.C.C. (2d) 330 (Ont. C.A.)

### **Examples of Contempt in the Face of the Court**

1. "...demonstrations in the courtroom by shouting, noisy behaviour, applauding a verdict of a jury or a decision of a judge; refusing to give evidence when properly subpoenaed as a witness or to answer relevant questions; refusing to leave the courtroom when ordered to do so or to obey the orders of a court as to a trial which is in progress...or using abusive or disrespectful language to a judge presiding at a trial."

J. C. McRuer, "Criminal Contempt of Court Procedure" 30 Can. Bar Review 225 at 227.

2. A defendant who in open court referred to the Crown Attorney as being, among other things, corrupt.

Paul v. R (1980), 52 C.C.C. (2d) 331, 15 C.R. (3d) 219 (S.C.C.)

3. A counsel's insolent, discourteous or otherwise objectionable comments about the presiding judicial official.

Re Morris C. Shumiatcher, Q.C., [1969] 1 C.C.C. 272 (Sask. C.A.)

4. A counsel in open court requesting the withdrawal of a member of the bench for no express reason.

Re Duncan (1957), 11 D.L.R. (2d) 616 (S.C.C.)

R. v. Fields (1986), 28 C.C.C. (3d) 353, 53 C.R. (3d) 260 (Ont. C.A.)

5. A defendant deliberately refusing to rise when the presiding magistrate came into the courtroom.

R. v. Hume, Ex parte Hawkins, [1966] 3 C.C.C. 43 (B.C.S.C.)

6. Persons fighting in the courtroom before the presiding judge.  
R. v. Ball and Parro (1971), 14 C.R.N.S. 238 (Ont. C.A.)
7. A witness who refuses to be sworn or to give evidence may be held in contempt. However, refusal to answer an irrelevant question is not contemptuous.  
Re Gerson (1946), 3 C.R. 111 (S.C.C.)  
R. v. Cohn (1984), 15 C.C.C. (3d) 150, 42 C.R. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused (1986), 9 O.A.C. 160
8. Insulting or insolent behaviour toward a trial judge, or language attributing gross insensitivity to a trial judge.  
R. v. Martin (1985), 19 C.C.C. (3d) 248 (Ont. C.A.)  
Chartrand v. R. (1971), 21 C.R.N.S. 49 (Que. C.A.)
9. A defendant who is intoxicated when he appears in court.  
R. v. Jolly (1990) 57 C.C.C. (3d) 389 (B.C.C.A.)
10. A defendant who indicates after conviction that he would offend again and would not get caught next time.  
R. v. Hunt (1977), 12 N. & P.E.I.R. 262 (Nfld. C.A.)

### **Sentence for Contempt**

Where a court is presided over by a provincial judge, it appears that there is no statutory maximum penalty for contempt. At common law, contempt may be punished by a fine or a jail sentence of up to (but not including) five years.

R. v. Cohn (1984), 15 C.C.C. (3d) 150, 42 C.R. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused (1986), 9 O.A.C. 160

Where a court is presided over by a justice of the peace, the maximum sentence is fixed by statute.

Provincial Offences Act, s.91(1)

### **Barring Counsel and Others from Appearing**

Upon a conviction for contempt, in addition to a monetary or other penalty, a judge may prohibit a lawyer from appearing in that judge's court until an apology is given.

Re Duncan (1957), 11 D.L.R. (2d) 616 (S.C.C.)

The judge's power to bar counsel from his court until the contempt is purged by an apology is superior to a defendant's right to counsel of choice.

Re William Thomas Mulligan (1971), 15 C.R.N.S. 382 (Ont. S.C.)



In addition, a justice of the peace may bar any person found guilty of contempt while acting as an agent, and who is not a barrister and solicitor, from continuing to act as agent in the proceedings.

Provincial Offences Act, s.91(7)

However, it is doubtful whether a justice of the peace has any powers to bar counsel from continuing to appear before him.

### **Disturbances Outside the Courtroom**

It seems that a justice of the peace only has authority to deal with contemptuous conduct within the courtroom. However it is an offence for a person outside a courtroom to knowingly and without reasonable justification disturb the proceedings of a court.

Courts of Justice Act, s.41

### **Charter**

The procedure for dealing with contempt in the face of the court does not violate sections 7, 11(c), 11(d), or 11(f) of the **Charter**.

R. v. Cohn (1984), 15 C.C.C. (3d) 150, 42 C.R. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused (1986), 9 O.A.C. 160

### **Power to Exclude Persons from Courtroom**

In addition to its contempt powers, the court has a specific statutory power to exclude the defendant from the courtroom in certain very limited circumstances: see s. 53(1) of the **Provincial Offences Act**.

There is also a power to exclude the public or any member of it from the courtroom in certain circumstances: see s. 53(2) of the Provincial Offences Act

These powers are available to both a provincial judge and a justice of the peace.

## RIGHT TO COUNSEL

### Introduction

A defendant, whether an individual or a corporation, may appear before provincial court and act personally, or he can be represented by counsel or an agent.

Provincial Offences Act: Section 50(1)(2)

The court may bar any person from appearing as an agent who is not a barrister and solicitor entitled to practise in Ontario if the court finds that the person is not competent to properly represent or advise the person for whom he appears as agent or does not understand and comply with the duties and responsibilities of an agent.

Provincial Offences Act: Section 50(3)

A defendant cannot be charged for failing to appear or have a warrant issued against him if counsel instructed by him appears in court on his behalf.

Provincial Offences Act: Sections 50(1)

R. v. Okanee (1981), 59 C.C.C. (2d) 149 (Sask. C.A.)

Notwithstanding that a defendant appears by counsel or agent, the court may order that the defendant personally appear. For example, if a defendant faces a probable term of incarceration, the court may order the defendant to personally witness the trial proceedings.

Provincial Offences Act: Section 51

R. v. Duperon and Bence, [1965] 3 C.C.C. 344 (Sask. C.A.)

### Provincial Offences Act

See sections 50, 51, 54, 82 and 91(7) of the **Provincial Offences Act**

See also: Section 8 of the **Professional Conduct Handbook**, The Upper Canada Law Society.

### Defendant's Right to Counsel--Pre Charter

Prior to the **Charter**, a defendant's right to retain and instruct counsel was drawn from common law.

"It is a fundamental principle of our criminal law that the choice of counsel is the choice of the accused himself, that no person charged with a criminal offence can have counsel forced upon him against his will, and that it is the paramount right of the accused to make his own case...if he so wishes, instead of having it made for him by counsel.

Vescio v. the King (1948), 92 C.C.C. 161 (S.C.C.) per Tachereau, J. at 164-165.

"It is, of course, fundamental that a person accused of a crime is entitled to make full answer and defence either personally or by counsel of his choice and that an accused may decline the services of counsel nominated by the Court."

Vescio v. the King, *supra*, per Locke, J. at 174-75.

The accused must be given a reasonable opportunity to consult or retain counsel. If the defendant, once given this opportunity, is unable to secure counsel, the presiding judge is required to ensure that the accused receives a fair trial.

R. v. Ewing and Kearny (1974), 25 C.R.N.S. 130 (B.C.S.C.) *affm'd* (1975), 29 C.R.N.S 227 (B.C.C.A.).

### **S.10(b) Right to Counsel under the Charter**

The purpose of the right to counsel is to ensure that those who are arrested and detained be advised of their legal rights and how to exercise them in dealing with government officials.

R. v. Ross [1989] 1 S.C.R. 3, 46 C.C.C. (3d) 129

Practically, section 10(b) of the **Charter** imposes three duties on police officers once they have arrested or detained a defendant.

- a) to inform the defendant of his right to retain and instruct counsel without delay;
- b) to give the defendant a reasonable opportunity to exercise his right to retain and instruct counsel, and;
- c) to refrain from attempting to elicit evidence from the defendant until he has had this opportunity.

R. v. Mannien (1987), 58 C.R. (3d) 97, 34 C.C.C. (3d) 385 (S.C.C.)

### **When is a Defendant Arrested or Detained?**

When a defendant is formally arrested, there is usually no question as to whether or not the defendant is arrested. What is usually the issue is whether or not a defendant is "detained" within the meaning of s.10(b) of the **Charter**.

In **R. v. Therens** (1985, S.C.C.) the court held that a person subject to a demand for a breathalyser test under the Criminal Code is "detained", and has a right to counsel without delay. The court defined "detention" as a deprivation of the liberty of the defendant by physical constraint other than arrest in which a person may reasonably require the assistance of counsel, *and* when a police officer assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes the defendant's access to counsel.

R. v. Therens (1985) 45 C.R. (3d) 97, 18 C.C.C. (3d) 481 (S.C.C.)

Trask v. R. (1985), 45 C.R. (3d) 137, 18 C.C.C. (3d) 514 (S.C.C.)

A defendant can be detained without the police officer using physical force if the defendant submits to the officer's request based on the belief that he has no other legal alternative. This element of psychological compulsion is sufficient to make the restraint of liberty involuntary.

R. v. Therens, [1985] 1 S.C.R. 613, 18 C.C.C. (3d) 481

R. v. Thomsen, [1988] 1 S.C.R. 640 at p.649

R. v. Moran (1987), 36 C.C.C. (3d) 58, 71 C.R. (3d) 178, 33 O.A.C. 190 (Ont. C.A.)

It seems that merely stopping an individual to generally inquire about a situation will not constitute a detention giving rise to his s.10(b) rights.

R. v. Lawrence (1990), 59 C.C.C. (3d) 55, 80 C.R. (3d) 289 (Ont. C.A.)

The mere asking of questions by police at the start of an investigation of persons who might be involved in illegal activity does not, in itself, constitute a detention.

R. v. Kay (1990), 53 C.C.C. (3d) 500 at p.506

However, provincial legislation giving a police officer power to pull over the driver of a motor vehicle to produce a valid driver's licence and proof of insurance does constitute a "detention" within the meaning of s.10(b).

Hufsky v. R. (1988), 63 C.R. (3d) 14, 40 C.C.C. (3d) 398 (S.C.C.)

### **Informing the Defendant of His Right to Retain and Instruct Counsel**

Once a defendant is arrested or detained, the police have a duty to inform the defendant of his right to retain and instruct counsel without delay. Section 10(b) of the Charter applies only to initial arrest or detention. There is no need to repeat the s.10(b) warning in the absence of apparent misunderstanding or non-comprehension.

R. v. Saltel (1986), 43 Man. R. (2d) 75, 42 M.V.R. 251 (Q.B.)



A police officer informing a defendant that he is allowed to make "one" phone call, is not fulfilling his duty under s.10(b). The defendant is entitled to make more than one phone call in his effort to retain counsel, so long as he is being diligent in his search.

R. v. Pavel (1989), 53 C.C.C. (3d) 296, 74 C.R. (3d) 195, 19 M.V.R. (2d) 294

Where there is no evidence to show that the accused did not understand the s.10(b) caution and there is no evidence that the police should have been aware that the accused could not understand the warning, the onus is on the defendant to prove that he did not, in fact, understand the legal consequences of waiving his s.10(b) rights.

R. v. Baig (1985), 20 C.C.C. (3d) 515, 46 C.R. (3d) 222 (Ont. C.A.)

Only when special circumstances surround the arrest, such as detaining an intoxicated defendant, does the officer have to be certain that the defendant understands and comprehends his s. 10(b) rights. The Supreme Court of Canada ruled that an intoxicated defendant who waived her s.10(b) rights and subsequently gave an incriminating statement to the police, was denied her right to counsel, as it is not enough for a police officer to tell an extremely intoxicated defendant what his s.10(b) rights are, rather the officer must be certain that defendant understood what his rights were and what legal consequences flow from having waived them.

Clarkson v. R. (1986), 50 C.R. (3d) 289, 25 C.C.C. (3d) 207 (S.C.C.)

R. v. Mohl (1987), 34 C.C.C. (3d) 435, 56 C.R. (3d) 318 (Sask. C.A.)

### Change in Circumstances

Usually, a defendant is only warned of his s.10(b) rights at the beginning of the arrest or detention. There is no general principle which states that a defendant must be continually reminded of these rights. However, a defendant can not exercise his s.10(b) rights in a meaningful way unless he realizes the extent of his involvement in the offence. In a situation where a defendant has consulted with his counsel, and then the police change or alter the charge, the defendant is allowed to exercise his s.10(b) rights again.

R. v. Black (1989), 70 C.R. (3d) 97, 50 C.C.C. (3d) 1 (S.C.C.)

The court in **Black** (1989, S.C.C.) illustrated this principle by holding that where a defendant is detained/arrested for attempted murder and is allowed to exercise his right to counsel and then subsequent to exercising that right, the victim dies, before the police can begin to question the defendant on the new charge of murder, the police must advise the accused again of his s.10(b) rights, and again give him reasonable opportunity to retain and instruct counsel.

R. v. Black (1989), 70 C.R. (3d) 97, 50 C.C.C. (3d) 1 (S.C.C.)

### **Duty to Inform Defendant of Availability of Legal Aid**

Where a defendant expresses a concern about his ability to afford a lawyer, the officer has a duty to inform him of the existence and availability of duty counsel as well as legal aid.

R. v. Brydges (1990), 74 C.R. (3d) 129, 53 C.C.C. (3d) 330 (S.C.C.)

### **Reasonable Opportunity to Retain Counsel**

As well as informing the defendant of his right to retain and instruct counsel, it is an officer's duty to give the defendant reasonable opportunity to do so. This may involve a number of things such as;

- a) providing the defendant with a telephone without the defendant having to ask for it;
- b) providing the defendant with a telephone book which has contained in it a list of lawyer's telephone numbers;
- c) allowing the defendant as many phone calls as are necessary to diligently retain counsel, and;
- d) a place to meet privately with his counsel.

R. v. Mannien, [1987] 1 C.R. 1233, 34 C.C.C. (3d) 461

R. v. Dombrowski (1985), 18 C.C.C. (3d) 164, 44 C.R. (3d) 1 (Sask. C.A.)

R. v. Smith (1988), 43 C.C.C. (3d) 379, 29 B.C.L.R. (C.A.)

### **Duty Not to Question Defendant**

Once a defendant has been advised of his s.10(b) rights, the police have a duty not to question the defendant in relation to the offence for which he is detained, until he has been given a reasonable opportunity to speak to counsel and be advised of his legal rights. This places a duty on the defendant to diligently pursue his rights under s.10(b) of the Charter.

R. v. Tremblay, [1987] 2 S.C.R. 435, 37 C.C.C. (3d) 535

Defendants have the right to choose counsel of their choice. It is only if that particular counsel cannot be available within a reasonable period of time, will the defendant be expected to contact another lawyer. What is "reasonable" will depend upon such circumstances as the nature of the offence, the type of evidence the police wish to obtain, the time of day, and the length of time it will be before that particular counsel will be able to advise the defendant. Reasonable diligence in the exercise of the right to choose one's counsel depends on the context facing the defendant.

R. v. Leclair (1989), 67 C.R. (3d) 209, 46 C.C.C. (3d) 129 (S.C.C.)

If it is found that the defendant is not being reasonably diligent in the exercise of his right to counsel, the officers' duty to cease from questioning him are suspended and do not bar the police from continuing their investigation and demanding evidence from him, such as a statement or breath sample.

R. v. Tremblay, [1987] 2 S.C.R. 435, 37 C.C.C. (3d) 535

### **Unavailability of Counsel**

When a trial date has been set and counsel who is then retained is unable to appear on the selected date, the defendant should retain other counsel. It is the discretion of the trial judge whether to allow the matter to be adjourned to a date which is convenient for the defence counsel, however there is no right as such.

R. v. Taylor (February 11, 1980), unreported (Ont. C.A.)

Re R. and Chimienti et al. (1980), 17 C.R. (3d) 306 (Ont. S.C.)

See also: "**Adjournments**"

### **Withdrawal of Defence Counsel by Defendant**

An defendant is entitled to discharge his counsel at any time. However, this termination by the client must be unequivocal to be effective.

R. v. Spataro (1971), 4 C.C.C. (2d) 215 (Ont. C.A.)

However, where the defendant has discharged counsel with the intent of delaying the process of the court, the court may not afford the accused a reasonable opportunity to retain new counsel.

### **Withdrawal by Defence Counsel**

Counsel does not enjoy the same freedom of withdrawal as his client. Once counsel has agreed to take on a case, he should complete the task as "ably as possible unless there is justifiable cause for terminating the relationship".

Rule 8(1) in the **Professional Conduct Handbook**, The Law Society of Upper Canada



In some circumstances, the lawyer may be obligated to withdraw from a case, such as:

- a) if the lawyer is instructed by his client to perform an act inconsistent with the lawyer's duty to the court;
- b) if the client is guilty of dishonourable conduct in the proceedings or is taking a position solely to harass or maliciously injure another; or
- c) if the lawyer's continued employment will lead to a breach of these Rules, such as a breach or conflict of interest.

Rule 8(3) in **Professional Conduct Handbook**, The Law Society of Upper Canada,  
Regina v. Speid (1984), 8 C.C.C. (3d) 18 (Ont. C.A.)

### **Counsel Who is Absent at Trial**

An accused who at the proceedings is deprived of counsel through no fault of his own, e.g. the lawyer simply did not attend, should not be forced to proceed.

Barrette v. the Queen (1976), 29 C.C.C. (2d) 189 (S.C.C.)

See also, **Contempt of Court**

### **Remedy**

When a defendant's section 10(b) rights have been infringed, he can apply to the court for a remedy under s.24(1) or 24(2) of the **Charter**.



## DEFENCES: GENERAL PRINCIPLES

### Introduction

The common law has developed a series of defences that are available for all offences. These defences justify or excuse the defendant's conduct, and thus exempt the defendant from criminal liability, even though the Crown has established the *actus reus* and (where applicable) the mental element of the offence charged. These common law defences also apply to offences under the **Provincial Offences Act**.

A distinction is sometimes drawn between those defences that are "justifications" and those that are "excuses". While the distinction is theoretically important, it has very little practical significance.

Some specific common law defences are discussed in the following sections. This section sets out some general principles governing those defences. These principles do *not* apply to the special defences of due diligence and honest and reasonable mistake of fact in offences of strict liability: see "Strict and Absolute Liability", *infra*, for a discussion of these defences.

### Statutory Provisions

See s. 80 of the **Provincial Offences Act**.

### Availability for Offences of Strict and Absolute Liability

While s. 80 of the **P.O.A.** imports common law defences, it does so only to the extent that they are available at common law. Accordingly, it is necessary to look to the common law to determine how far such defences apply to offences of strict and absolute liability.

It is now clear that common law general defences do apply to offences of both strict and absolute liability.

R. v. Walker (1979), 48 C.C.C. (2d) 126, 5 M.V.R. 114 (Ont. Co. Ct.)

R. v. Cancoil Thermal Corporation and Parkinson (1986), 27 C.C.C. (3d) 295, 52 C.R. (3d) 188 (Ont. C.A.)

R. v. Metro News Ltd. (1986), 29 C.C.C. (3d) 35, 53 C.R. (3d) 289 (Ont. C.A.), leave to appeal to S.C.C. refused *ibid*.

## Onus of Proof

At common law, a defendant is not required to prove the existence of a general defence. Once there is some evidence before the court of a defence (whether adduced by calling defence evidence or through cross-examining Crown witnesses), the Crown bears the onus of disproving the defence beyond a reasonable doubt.

Perka v. R. (1984), 14 C.C.C. (3d) 385, 42 C.R. (3d) 113 (S.C.C.)

R. v. Holmes (1988), 41 C.C.C. (3d) 497, 64 C.R. (3d) 97 (S.C.C.)

It appears that the same onus applies with offences of strict and absolute liability. The defendant need only adduce some evidence of the defence; once this is done, the Crown must prove beyond a reasonable doubt that the defence is not available.

R. v. Walker (1979), 48 C.C.C. (2d) 126, 5 M.V.R. 114 (Ont. Co. Ct.)

Contra: R. v. Kennedy (1972), 7 C.C.C. (2d) 42 (N.S. Co. Ct), now overruled on this point by Perka v. R. (1984), 14 C.C.C. (3d) 385, 42 C.R. (3d) 113 (S.C.C.)

The Ontario Court of Appeal has held that the defence of officially induced error must be established by the defendant on a balance of probabilities. This probably does not affect the general principle set out above. Rather, it reflects the court's view that officially induced error is a form of due diligence defence, and so is subject to the special rules applicable to that defence.

R. v. Cancoil Thermal Corporation and Parkinson (1986), 27 C.C.C. (3d) 385  
52 C.R. (3d) 188 (Ont. C.A.)

## DEFENCES: DE MINIMIS

### Introduction

There has been considerable dispute whether the maxim *de minimis non curat lex* ("the law does not concern itself with small things", "the law does not trouble with trifles") creates a defence. While it is not ordinarily used as a defence to criminal offences in Ontario (other than perhaps in offences of possession), it is available for offences under the **Provincial Offences Act**.

### Criminal Offences

*De minimis* is not available as a defence to a criminal charge in Ontario.

R. v. Li (1984), 16 C.C.C. (3d) 382 (Ont. H.C.)

However, it appears that *de minimis* may be a consideration where abuse of process is alleged, although it does not by itself give rise to an abuse of process.

R. v. Appleby (1990), 78 C.R. (3d) 282 (Ont. Prov. Ct.)

### Provincial Offences

The defence of *de minimis* is available to a charge under a provincial statute or by-law in Ontario, even where the offence is one of absolute liability. It is a matter for the discretion of the trial judge whether the defence is available in a particular case. Relevant considerations include:

- a) the harm sought to be addressed by the legislature in the statute and whether the offence involves this harm;
- b) the extent of the breach and whether it is a "technical" breach;
- c) whether justice and the public interest would be served by a conviction.

The defence is only available in very special circumstances.

Re R. and Webster (1981), 15 M.P.L.R. 10 (Ont. Dist. Ct.)

The holding that *de minimis* applies to provincial offences, but not criminal offences, is not as contradictory as it may seem. Under s. 736 of the **Criminal Code**, where the facts support a conviction a judge may, instead make a finding of guilt, impose an absolute or conditional discharge (at least for less serious offences). Discharges are not available under the **Provincial Offences Act** (except for young offenders).

See "Sentencing" under **Procedure**, below.

## Careless Driving

Judicial interpretation of the offence of careless driving under s. 130 of the **Highway Traffic Act** has interpreted the offence itself to include what is in effect, a *de minimus* principle. Careless driving is not necessarily proved just because a driver failed to live up to the standard of the reasonable person. The departure from that standard must be such that it is a breach of duty to the public and deserving of punishment.

R. v. Beauchamp (1953), 16 C.R. 270 (Ont. C.A.)

See the annotation to s. 130 of the **Highway Traffic Act**, below.

Accordingly, it is doubtful that the *defence* of *de minimus* has any application to the offence of careless driving once the Beauchamp test has been applied.



## DEFENCES: IMPOSSIBILITY

### Introduction

Where it is impossible for a defendant to comply with a statute, the defendant may argue that this very impossibility gives rise to a defence. While there is some limited judicial support for a general defence of impossibility, it is submitted that it does not, and should not, form part of the law in Canada.

### The Law in England

There is support in English law for a defence of impossibility to regulatory offences in certain cases, although not for a general defence of impossibility.

Burns v. Bidder, [1967] 2 Q.B. 227 (Div. Ct.)

Cf. R. S. Clark "The Defence of Impossibility and Offences of Strict Liability" (1968-69) 11 Crim. L.Q. 154

However, English cases on this issue must be approached with caution. English law does not recognize the "half-way house" of strict liability as that term has been used in Canadian cases since 1978, where general defences of honest and reasonable mistake and due diligence are available. "Strict liability" in English law is equivalent to absolute liability in Canadian law. Accordingly, English courts have given limited recognition to the defence of impossibility as a way to alleviate the harshness of their version of strict liability. Since Canadian law distinguishes between strict and absolute liability, this reason for recognizing the defence does not apply in Canada.

### The Law in Canada

There are some Canadian cases suggesting that defences of practical and commercial impossibility may exist.

R. v. Pootlass (1977), 1 C.R. (3d) 378 (B.C. Prov. Ct.)

R. v. Gilkes (1978), 8 C.R. (3d) 159 (Ont. Prov. Ct.)

R. v. Allen (1979), 59 C.C.C. (2d) 563, 3 M.V.R. 203 (Ont. Dist. Ct.)

However, it is doubtful whether these three decisions are authority for any general defence of impossibility. The first predates **R. v. City of Sault Ste. Marie** (1978, S.C.C.), and the distinction drawn in that decision between offences of strict and absolute liability. The second and third decisions do not explicitly recognize the defence. Rather, they hold that even if the defence existed, it would not be established on the facts. As well, it is doubtful that **Allen** was correctly decided.

See the annotations to ss. 116 of the **Highway Traffic Act**, below



Moreover, it is submitted that the recognition of the distinction between strict and absolute liability undercuts most arguments for a defence of impossibility. With offences of strict liability, a defendant has a defence where (and only where) all reasonable care was taken to avoid the acts constituting the offence. Since the focus is on the efforts of the defendant to prevent the offence, the question of whether the conduct could have been avoided at all becomes irrelevant. With offences of absolute liability, a defendant may be convicted even if he made all reasonable efforts to avoid the commission of the offence. If the justifications for having absolute liability are accepted at all, they justify the conviction of a person who could not have avoided the commission of an offence as well as a person who took all reasonable care to avoid the commission of an offence.

## MISTAKE OF LAW AND OFFICIALLY INDUCED ERROR

### Introduction

The maxim *ignorantia juris non excusat* ("ignorance of the law is no excuse") has long been a part of the criminal law. It is continued in both the **Criminal Code** and the **Provincial Offences Act**.

Four principal arguments have been advanced in support of the rule: that claims of ignorance of law would be too difficult to disprove; that recognition of the defence would encourage people not to know the law; that failure to know the law is in itself blameworthy; and that recognition of the defence would restrict the law binding on each person to the law that person knows, rather than having a fixed standard of care for everyone. Each of those arguments may have some merit. Nevertheless, the maxim has been criticized, since on its absolute terms it may lead to the conviction of persons who are in no sense blameworthy (such as those who have made all reasonable efforts to know the law, or those who have relied in good faith on the advice of persons who should know the law). The recent development in Canada of the defence of "officially induced error" (discussed below) goes some way to meeting this criticism.

See A.T.H. Smith "Error and Mistake of Law in Anglo-American Criminal Law" (1985),  
14 Anglo-Am. L.R. 3.

### Provincial Offences Act

See s. 81

### Meaning of "Mistake of Law"

Mistake (or ignorance) of the law refers to a situation where a person is ignorant or mistaken about the existence, meaning or application of the law. A person has no defence where he incorrectly thinks that the facts as he believes them to be (in a full *mens rea* offence) or as he reasonably believes them to be (in a strict liability offence), do not contravene the law.

R. v. Molis, [1980] 2 S.C.R. 156, 55 C.C.C. (2d) 558 (S.C.C.)

R. v. Metro News Limited (1986), 29 C.C.C. (3d) 35, 53 C.R. (3d) 289 (Ont. C.A.),  
leave to appeal to S.C.C. refused *ibid*

R. v. Baxter (1982), 6 C.C.C. (3d) 447 (Alta. C.A.)

R. v. Tran (1987), 35 C.C.C. (3d) 508 (Alta. Q.B.)

A person who misreads an official declaration of the law (such as a statute, regulation or road sign) makes a mistake of law and so has no defence.

R. v. Cunningham (1979), 45 C.C.C. (2d) 544 (Ont. Div. Ct.)

## Non-Publication of Regulation

The **Ontario Regulations Act** provides that a regulation that has not been published in **The Ontario Gazette** is not effective against a person who has not had actual notice of it. This is a wider restriction on liability than the federal **Statutory Instruments Act**, which only requires the Crown to prove that reasonable steps had been taken to bring the purpose of the regulation to the notice of those persons likely to be affected by it.

Regulations Act, R.S.O. 1990, c. R 21 s. 5(3)

Cf. Statutory Instruments Act, R.S.C. 1985, c. S-22, s. 11(2)

Molis v. R. [1981] 2 S.C.R. 156, 55 C.C.C. (2d) 558 (S.C.C.)

R. v. Catholique (1979), 49 C.C.C. (2d) 65 (N.W.T.S.C.)

It would seem that the onus is on the Crown to prove actual notification of the regulation, not on the defendant to prove lack of such notification.

## Due Diligence in Ascertaining Law

Since 1977, due diligence has been a defence to offences of strict liability. However, it is only due diligence in ascertaining facts, or fulfilling a duty prescribed by law, that creates a defence. Due diligence in ascertaining the existence of law or its correct interpretation is not a defence.

Molis v. R., [1981] 2 S.C.R. 156, 55 C.C.C. (2d) 558 (S.C.C.)

Accordingly, a person who relies in good faith on apparently reasonable legal advice does not have a defence.

R. v. Slegg (1974), 17 C.C.C. (2d) 149 (B.C. Prov. Ct.)

R. v. Giroux (1979), 55 C.C.C. (2d) 375 (Que. S.C.)

R. ex re. Irwin v. Dalley (1951), 118 C.C.C. 116 (Ont. C.A.)

Similarly, a person has no defence where he relies in good faith on a decided case that is subsequently overturned or overruled.

R. v. MacIntyre (1983), 24 M.V.R. 67 (Ont. C.A.), leave to appeal to S.C.C. refused (1984), 2 O.A.C. 400.

R. v. Dunn (1977), 21 N.S.R. (2d) 334 (C.A.)

R. v. Campbell and Mlynarchuk (1972), 10 C.C.C. (2d) 26, 21 C.R.N.S. 273 (Alta. Dist. Ct.)

## Effect on Sentence

While a reasonable mistake of law is not a defence, it is a significant mitigating factor on sentence.

R. v. Arrowsmith, [1975] 1 All. E.R. 463 (U.K.C.A.)

R. v. Baxter (1982), 6 C.C.C. (3d) 447 (Alta. C.A.)

## Officially Induced Error

The Ontario Court of Appeal has now recognized that "officially induced error" may be a defence to a breach of a regulatory statute.

The defence of "officially induced error" is available as a defence to an alleged violation of a regulatory statute where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law. In order for the accused to successfully raise this defence, he must show that he relied on the erroneous legal opinion of the official and that his reliance was reasonable. The reasonableness will depend upon several factors including the efforts he made to ascertain the proper law, the complexity or obscurity of the law, the position of the official who gave the advice, and the clarity, definitiveness and reasonableness of the advice given.

It seems that the defence involves the following elements:

1. the person giving the advice or opinion is an official responsible for the administration or enforcement of the particular law;
2. a legal opinion or legal advice was given;
3. the legal opinion or advice was apparently reasonable;
4. the defendant relied on the advice, and;
5. the reliance was reasonable in all the circumstances.

The onus lies upon the defendant to establish the defence on a balance of probabilities.

R. v. Cancoil Thermal Corporation and Parkinson (1986), 27 C.C.C. (3d) 285, 52 C.R. (3d) 188 (Ont. C.A.)

The person seeking advice must take reasonable care to ensure that the official from whom advice is sought is fully aware of all relevant facts and that these facts are accurate.

R. v. Robertson (1984), 30 M.V.R. 248, 43 C.R. (3d) 39 (Ont. Prov. Ct.)

It is not clear if the defence of officially induced error is available for offences of absolute (as opposed to strict) liability. On one hand, general defences such as necessity clearly apply to offences of absolute liability. On the other hand, the requirement that the

defendant prove the defence on a balance of probabilities suggests that the Ontario Court of Appeal sees the defence of officially induced error as being a form of due diligence defence; general defences such as necessity only require that there be *some* evidence, which shifts the onus to the Crown to disprove the defence beyond a reasonable doubt. Due diligence is not a defence to absolute liability offences. It is submitted that the correct inference to be drawn is that the defence of officially induced error does not apply to absolute liability offences.

R. v. Cancoil Thermal Corp and Parkinson (1986), 27 C.C.C. (3d) 285 at 303-304, 52 C.R. (3d) 188 (Ont. C.A.)

On general principles, evidence sufficient to raise the defence can be given by the defendant. It is not, as a matter of law, necessary for the defence to call the person who allegedly gave the advice. Indeed, it may not be possible for the defendant to do so where, for example, the advice was given by a junior person in a Ministry, whose identity is unknown, during a telephone conversation (although this may affect the reasonableness of the reliance). The evidence of the defendant as to the advice given is not hearsay, since it is the fact that the advice was given, not the truth of the contents of the advice, that is important. Having said this, the defendant continues to bear the burden of proof on a balance of probabilities that the advice was given. It will probably be a rare case when the defendant can do this without some supporting evidence, especially where there is an issue as to the reasonableness of the advice and the reasonableness of the reliance upon it.



## DEFENCES: NECESSITY

### Introduction

The defence of necessity (or "duress of circumstances") recognizes that situations may exist where a person must choose between obeying the law and preventing some greater harm. In such circumstances, the offence committed may be excusable, and the defendant will have a defence to the charge.

The common law has been slow to develop the defence of necessity. While the existence of the defence has now been authoritatively recognized, the principles that govern it are still being developed. In particular, cases decided before 1984 must be approached with caution.

### Nature of the Defence

The defence of necessity excuses a person who breaks the law where that person's conduct was "morally involuntary", in the sense that the person had no other viable or reasonable choice available. The defence applies only in urgent situations of imminent peril where compliance with the law is demonstrably impossible. It is not available where the person had a reasonable legal alternative way of avoiding the peril, or where the harm caused is greater than the harm sought to be avoided.

Perka v. R. (1984), 14 C.C.C. (3d) 385, 42 C.R. (3d) 113 (S.C.C.)

### Availability for Provincial Offences

The defence of necessity, like other general defences, is available for offences of strict and absolute liability.

R. v. Walker (1979), 48 C.C.C. (2d) 126, 5 M.V.R. 114 (Ont. Dist. Ct.)

R. v. Cancoil Thermal Corp. and Parkinson (1986), 27 C.C.C. (3d) 285  
52 C.R. (3d) 188 (Ont. C.A.)

### Urgent and Imminent Peril

The defence of necessity only applies in situations of "urgent and imminent peril".

Perka v. R. (1984), 14 C.C.C. (3d) 385, 42 C.R. (3d) 113 (S.C.C.)

The defence is not available where there is a threat of future, as opposed to present, harm.

R. v. Tewari (1987), 36 C.C.C. (3d) 150 (B.C.S.C.)



### Nature of Harm Threatened

It appears that the defence is only available where there is a threat to the life, health or safety of a person.

Perka v. R. (1984), 14 C.C.C. (3d) 385 at 404-405, 42 C.R. (3d) 113 (S.C.C.)

However, the defence is not available where the threat to health is not serious and immediate.

R. v. Plesnik (1983), 26 M.V.R. 69 (Ont. Prov. Ct.)

A tailgating vehicle does not create a defence of necessity to a charge of speeding, at least where the vehicle does not create an aura of threat or intimidation.

R v. Walls (1986), 47 M.V.R. 92 (B.C. Co. Ct.)

A social worker's desire to meet with two clients, where there was no threat to life or health involved, would not give rise to a defence of necessity on a charge of speeding.

R. v. Paul (1973), 12 C.C.C. (2d) 497 (N.S. Co. Ct.)

The defence of necessity to a charge of assault was recognized where the defendant forcibly restrained an intoxicated person from jumping out of a moving car. The person would have had a two-mile walk along a country road at night.

R. v. Morris (1981), 61 C.C.C. (2d) 163 (Alta. Q.B.)

The defence was held not to be available to a police officer charged with a highway traffic offence ("red light-fail to stop") where he was on his way to an emergency but there was no evidence of the nature of the emergency (or what the officer believed it to be). However, the defence was held to be available on a seat belt charge where the officer was attending a potentially life-threatening situation where he might be called on to use a firearm.

R. v. Walker (1979), 48 C.C.C. (2d) 126, 5 M.V.R. 114 (Ont. Co. Ct.)

R. v. Gallant (1988), 6 W.C.B. (2d) 388 (Ont. Prov. Ct.)

### Creation of Situation of Necessity

The defence of necessity will not be available where the situation giving rise to the necessity arose from the actions of the defendant and was a reasonably foreseeable result of those actions.

Perka v. R. (1984), 14 C.C.C. (3d) 385 (S.C.C.)

R. v. Hendricks (1988), 44 C.C.C. (3d) 52 (Sask. Q.B.) leave to appeal to C.A.  
refused *ibid.*

**Availability of Alternatives**

The defence of necessity is not available where there is a reasonable alternative way to avoid the peril or prevent the harm. The court must consider whether the defendant had a "legal way out".

Perka v. R. (1984), 14 C.C.C. (3d) 385, 42 C.R. (3d) 113 (S.C.C.)

R. v. Doud (1982), 18 M.V.R. 146 (Sask. Prov. Ct.)

R. v. Berriman (1981), 45 M.V.R. 165 (Nfld C.A.)

R. v. Follett (1987), 3 W.C.B. (2d) 192 (Ont. Dist Ct.)



## JUSTICE OF THE PEACE

### Introduction

All Provincial Court Judges are Justices of the Peace and are capable of performing the tasks assigned to Justices of the Peace as well as to Provincial Court Judges. Not all Justices of the Peace, however, are Provincial Court Judges and therefore they may only perform such activities which are within their own jurisdiction.

Justices of the Peace Act, R.S.O. 1990, c. J.4, s. 2(1)

Justices of the Peace fall under the heading of s. 92(14) the "administration of justice" in the Constitution Act, 1867. Therefore, the right to legislate as to the appointment of Justices of the Peace is conferred upon the legislature of the province.

Lenoir v. Ritchie (1979), 3 S.C.R. 575 (S.C.C.)

R. v. Bush (1888), 15 O.R. 398 (C.A.)

Justices of the Peace in Ontario are appointed by the Lieutenant Governor in Council, as opposed to Judges who are appointed by the Lieutenant Governor.

Justices of the Peace Act, R.S.O. 1990, c. J.4, s. 2(1)

The meaning of "Justice" in the **Provincial Offences Act** means a provincial judge or a justice of the peace.

**Provincial Offences Act**, R.S.O. 1990, c. P. 33, s. 1(1)

### Provincial Offences Act

See sections 1(1) and 30

### Powers and Duties of a Justice of the Peace

Historically, Justices of the Peace performed administrative functions, and also sat with Judges to hear serious criminal matters. Justices of the Peace were only allowed to hear the lesser offences sitting alone.

The modern role of the Justice of the Peace has been substantially changed in the last decade to accommodate many of the duties previously discharged by the (now abolished) office of the Magistrate.

Re Currie and the Niagara Escarpment Commission (1984), 13 C.C.C. (3d) 35 (Ont. S.C.)  
affirmed December, 1984 (Ont. C.A.)

Some duties which a Justice of the Peace performs include:

1. Presiding over judicial interim release hearings;
2. Performing marriages;
3. Hearing and considering the allegations and evidence contained in informations which must be endorsed by the Justice of the Peace before process is issued on the information;

Southwick ex p. Gilbert Steel Limited, [1968] 1 C.C.C. 356 (Ont. C.A.)

4. Issuing warrants for the arrest of one who on reasonable and probable grounds is suspected of having committed an indictable offence, and;

Section 504 and s. 511, Criminal Code of Canada

5. Presiding over provincial offences matters.

### **Role of Justice when Adjudicating Provincial Offences Court**

When presiding over a trial, the Justice should listen to the case at hand and allow counsel for both sides to conduct their own case as long as they are both adhering to the rules of evidence and procedure. After all the evidence is heard, then it is the Justice's duty to adjudicate on the matter.

"We think it is the right of a litigant to have his case submitted to the tribunal as his counsel thinks advisable and in the interest of his client--being governed, of course, by the rules governing trial which are well established and recognized; the trial Judge has no right to take the case into his own hands, and out of the hands of the counsel.

Boran et al. v. Wenger, [1942] O.W.N. 185, approved by Porter C.J.O. in R. v. Viger, (1958), 122 C.C.C. 159 at 161 (Ont. C.A.)

### **Allowing Counsel for the Defendant to Present Argument**

At a trial or any other judicial proceeding, the court must allow both counsel to call witnesses and present submissions on the evidence before an adjudication is made. The defendant cannot be deprived of his right to make a full answer and defence.

Provincial Offences Act: Section 46(2)

Aucoin v. the Queen, [1979] 1 S.C.R. 554 (S.C.C.)

R. v. Viger (1958), 122 C.C.C. 159 (Ont. C.A.)

If the Justice/Judge renders a decision without allowing argument from defence counsel, he has the discretion to withdraw his earlier judgement and allow counsel the opportunity to present his argument.

R. v. Kovacevic (1951), 99 C.C.C. 258 (Ont. H.C.)

### **Discussions with Counsel**

A justice/judge should not discuss a case at hand with one counsel if the other party or counsel is not present. Discussions which take place with counsel in the justice's chambers should be avoided. The chance that the conversation or agreement is misunderstood or misrepresented when counsel return to court is great, as the conversation has not been recorded. Also, since trials are public hearings, they should not be held in private.

R. v. Turner, [1970] 2 All E.R. 281

### **The Right of a Justice/Judge to ask Questions in Court**

"It is always proper, of course, for a judge--and it is his duty--to put questions with a view to elucidating an obscure answer or when he thinks that the witness has misunderstood a question put to him by counsel".

Yuill v. Yuill, [1945] 1 All E.R. 183 at p. 188

The Justice may question witnesses to clarify or to further describe evidence adduced by counsel.

R. v. Viger (1958), 122 C.C.C. 159 (Ont. C.A.)

A judge may also ask questions of a witness if he feels that the question should have been asked by counsel to bring out or explain relevant matters, but the question was not asked.

R. v. Torbiak and Campbell (1974), 26 C.R.N.S. 108 (Ont.C.A.) 109-110

If a judge/justice finds it necessary to intervene in the examination of a witness with observations or questions he should not do so where the participation is likely to indicate a predisposition in the Judge's mind toward one side or the other.

R. v. Denis, [1967] 1 C.C.C. 196 at 202 (Q.Q.B. Appeal side)

It is not proper for a justice to cross-examine a defendant, whether represented or not, so as to extract prejudicial admissions.

R. v. McCormick (1961), 130 C.C.C. 196 (B.C.C.A.)



## Protecting Witnesses

The Justice has the power to protect a witness from harassing questions that are repetitive or irrelevant to the issues in the specific case at hand.

R. v. Bradbury (1973), 14 C.C.C. (2d) 139 at 140-41.

The Justice also has the power to direct the trial away from questioning when it is irrelevant to the charge at hand.

R. v. Valley (1986), 26 C.C.C. (3d) 207 (Ont. C.A.)

## The Right of a Justice/Judge to Call Witnesses

The presiding Justice/Judge has the right to call a witness, including an expert witness, who is not called by either the prosecution or the defence, without their consent, if, in his opinion, the witness's testimony is necessary in the "interests of justice".

R. v. Harris, [1927] 2 K.B. 587, (1927), 96 L.J.K.B. 1069 at 1072

R. v. P.R.S. (1987), 38 C.C.C. (3d) 109, 69 C.R. (3d) 159 (Ont. H.C.)

This power, however, should only be exercised where the defence has closed its case, when something has arisen out of the defendant's testimony which could not have been previously foreseen.

R. v. Bouchard (1973), 12 C.C.C. (2d) 554 (N.S. Co. Ct.)

R. v. McPhee (1985), 19 C.C.C. (3d) 345, 37 Alta. L.R. (2d) 115 (Q.B.)

The Justice/Judge also has the right to make a motion excluding witnesses from the courtroom when they are not testifying. He also has the right to deny either counsel's motion to have witnesses excluded.

Re Richard v. R. (1983), 7 C.C.C. (3d) 579 (Ont. C.A.)

## Restoring Order/Preventing Disorder

The Justice has the right to ban such persons from the courtroom who are disturbing the proceedings. This includes the right to ban the defendant from the trial, if he is intimidating testifying witnesses.

See also: **Contempt of Court**

## Right of Justice to Raise Charter Issues

If apparent Charter issues are not raised during the trial, the Justice should not raise them himself if the defendant is represented by counsel.

R. v. Erickson (1984), 13 C.C.C. (3d) 269

However, if the defendant is not represented by counsel, then the Justice is free to raise the Charter issues and have the two sides make submissions on the matter.

R. v. Fraillon (1990), 11 W.C.B. (2d) 554 (Que. C.A.)

## Stare Decisis

This legal principle is applicable to both Justices of the Peace and Provincial Judges sitting in Provincial Offences Court.

See **Stare Decisis** *infra* for a full explanation of the doctrine.

## Independent and Impartial

Justices of the Peace in Ontario are independent and impartial as is required in section 11(d) of the **Charter**.

Reference Re Justices of the Peace Act; Re Currie and Niagara Escarpment Commission (1984), 16 C.C.C. (3d) 193, 14 D.L.R. (4th) 65 (Ont. C.A.)

Re Valois and Universal Spa Ltee (1986), 33 C.C.C. (3d) 535 (Que. C.A.)

The Ontario Court of Appeal has held that the appointment of part-time judges does not give rise to an apprehension that these judges lack independence from the government who appoints them.

R. v. Lippe (1990) 61 C.C.C. (3d) 127 (Ont. C.A.)

## Functus Officio

In exceptional circumstances, a justice, after finding a defendant guilty but before pronouncing his sentence, may re-open the proceedings to allow for the defence to adduce additional evidence in an effort to have the finding of guilt reversed.

R. v. Lessard (1977), 30 C.C.C. (2d) 70 (Ont. C.A.)

A court has completed its duties after it has sentenced a defendant (except where the sentence is suspended) and is said to be *functus officio*, therefore any actions by a judicial officer after such a point is a nullity.

Laplane v. Court of Sessions of the Peace (1938), 69 C.C.C. 291 (Que. Sup. Ct.)

R. v. Conley (1979), 47 C.C.C. (2d) 359 (Alta. C.A.)

A court which dismisses a charge cannot re-open the proceedings.

R. v. Lessard (1977), 30 C.C.C. (2d) 70 (Ont. C.A.)

If a valid sentence has been pronounced, any errors in the preparation of documents used to gain the conviction, such as an error in the date on a warrant of committal, can be amended at any time to conform with the sentence imposed.

R. v. Craig (1977), 37 C.R.N.S. 398 (B.C.S.C.)

**ONTARIO COURT (PROVINCIAL DIVISION)****Introduction**

As a result of the scheme of court reform that came into effect on September 1, 1990, the former Provincial Offences Court no longer exists. Proceedings under the **Provincial Offences Act** are now heard in the Ontario Court (Provincial Division).

**Statutory Provisions**

See the **Courts of Justice Act**, R.S.O. 1990, Ch. C. 43, ss. 34, 35, 38, 39.

**Presiding Judge**

Either a justice of the peace or a provincial judge may preside over the trial of a matter under the **Provincial Offences Act** in the Ontario Court (Provincial Division).

Courts of Justice Act, s. 39

An Ontario Court (Provincial Division) presided over by a justice of the peace is an independent and impartial tribunal within the meaning of s. 11(d) of the **Charter**.

Reference Re Justices of the Peace Act (1984), 16 C.C.C. (3d) 193 (Ont. C.A.)

Given the selection and training scheme for justices of the peace in Ontario, the fact that a justice of the peace presiding in the Ontario Court (Provincial Division) is not legally qualified does not necessarily result in a violation of a defendant's right to "fundamental justice" under s. 7 of the **Charter** or a "fair hearing" under s. 11(d) of the **Charter**.

R. v. Davies (1990), 56 C.C.C. (3d) 321 (Ont. Prov. Ct.)

Note, however, that this decision may not foreclose an argument that a particular justice may not by reason of lack of qualification be able to give a "fair hearing", or that there is a constitutional right to have a particular matter heard by a court presided over by a legally qualified person.



## PARTIES TO AN OFFENCE

### Introduction

The criminal law does not limit liability to persons who actually commit offences, but extends it to those who aid, abet, counsel or procure another person to commit an offence. This extended liability is continued in the **Provincial Offences Act**.

Unlike the **Criminal Code**, however, the **Provincial Offences Act** does not provide for liability for incitement (counselling or procuring another person to commit an offence when that offence is not committed). Under the **Provincial Offences Act**, there must be an offence committed before a person can be found guilty as a secondary party.

### Provincial Offences Act

See Sections 77 and 78

### Aiding and Abetting

1. A person who is simply present, i.e., a passive spectator, at the scene of a crime is not a party, even if he does nothing to prevent it.  
Dunlop and Sylvester v. R. (1979), 47 C.C.C. (2d) 93 (S.C.C.)
2. A person's presence at the scene of a crime may in itself in certain circumstances be some evidence of aiding and abetting.  
Preston v. R (1949), 93 C.C.C. 81 (S.C.C.)
3. A person who is present at the scene of a crime with prior knowledge that a crime was to occur may be a party if he offered no opposition to the commission of the offence.  
Dunlop and Sylvester v. R. (1979), 47 C.C.C. (2d) 93 (S.C.C.)
4. A person who is present and has the authority to prevent the commission of an offence by another may be guilty of aiding the offence if he omits to make any efforts to stop it.  
R. v. Kulbacki, [1966] 1 C.C.C. 167 (Man. C.A.)
5. A person who is present at the scene of a crime and who does more than simply watch, e.g., encourages the principal offender, or does an act which facilitates the commission of the offence such as keeping watch or enticing the victim to the scene, is guilty as a party.  
Dunlop and Sylvester v. R. (1979), 47 C.C.C. (2d) 93 (S.C.C.)



6. A person who is present at the scene of a crime and who encourages the principals by laughing and yelling is guilty as a party.  
R. v. Black, [1970] 4 C.C.C. 251 (B.C.C.A.)
7. A person who is present at the scene of a crime and whose presence ensures against the escape of the victim is guilty as a party.  
R. v. Black, [1970] 4 C.C.C. 251 (B.C.C.A.)
8. A person may be an aider and abettor without active participation at the moment the crime is committed. His actions or omissions may precede the actual crime.  
R. v. Halmo, [1941] O.R. 99 (Ont. C.A.)
9. A person may be an aider and abettor if with the intention of giving assistance he is near enough to provide it should the occasion arise.  
R. v. McLeod et al. (April 13, 1982), unreported (Ont. C.A.). Leave to appeal to Supreme Court of Canada refused Fall of 1983.

### **Abet Defined**

The acts done or words uttered must be intended to encourage the principal offender to commit the offence. Abetting involves assistance for the purpose of aiding the principal.

R. v. Curran (1977), 38 C.C.C. (2d) 151 (Alta. C.A.) application to S.C.C. dismissed 1978.

### **Counselling Defined**

Counselling means to advise or recommend an illegal course of action. It is immaterial that the party counselled was not influenced by the communication. The counsellor and the recipient need not meet and discuss the matter face to face. Counselling may be done through a publication.

R. v. McLeod et al (1970), 12 C.R.N.S. 193 (B.C.C.A.)

### **Procure Defined**

"To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening. We think that there are plenty of instances in which a person may be said to procure the commission of a crime by another even though there is no attempt at agreement or discussion as to the form which the offence should take."

Attorney General's Reference (No. 1), [1975] Q.B. 733 at 779 (Eng. C.A.)

The offence of procuring is committed even though the person procured did not ever intend to commit the crime. It is not necessary to prove that the procurer persistently prevailed upon the other person. It is enough that the procurer and the other person ostensibly agreed that the other was to commit an offence, that is, the offer of the procurer was accepted by the one procured with a reward offered as consideration. There is no distinction between procuring an offence and procuring a person to commit an indictable offence.

R. v. Glubisz (No. 2) (1979), 9 C.R. (3d) 300 (B.C.C.A.)

### **Common Intention/Purpose**

Although the principal is not convicted of an offence, a secondary offender who formed a common intention to carry out an unlawful purpose and to assist the principal may be found guilty if the offence was a probable consequence of carrying out the common purpose.

Remillard v. R. (1921), 35 C.C.C. 227 (S.C.C.)

Zanini v. R. (1967), 2 C.R.N.S. 219 (S.C.C.)

The intermittent operation of an automobile by an impaired driver and passenger over a period of several hours is an unlawful purpose. Each assisted the other and when one of them causes death by criminally negligent driver, the other is liable as a party for such foreseeable consequences.

R. v. Lachance (1962), 132 C.C.C. 202 (Man. C.A.)

The abandonment of a common intention must be clearly communicated to the other parties to be effective.

R. v. Whitehorse (1940), 75 C.C.C. 65 (B.C.C.A.)

Henderson v. R. (1948), 91 C.C.C. 97 (S.C.C.)

### **Accused Tried Alone**

Where the accused is being tried alone and there is evidence that more than one person was involved in the commission of the offence, the statutory provisions concerning parties to offences should be considered even though the identity of the other participant(s) is unknown and even though the precise part played by each participant may be uncertain.

R. v. Sparrow (1979), 51 C.C.C. (2d) 443 (Ont. C.A.)

R. v. Isaac (1984), 9 C.C.C. (3d) 289 (S.C.C.)

## Secondary Offenders in Driving Offences

The following cases indicate the potential culpability of friends or passengers.

- (1) Where a person surreptitiously laced a friend's drinks with double quantities of liquor knowing that his friend would soon be driving home, that person was held to have procured the commission of an offence by the friend who he knew was going to drive with more than the legal limit of blood alcohol.

Attorney-General's Reference (No.1), [1975] Q.B. (Eng. C.A.)

- (2) The owner of a car hired a chauffeur to drive him along with some friends from Windsor to London. En route the chauffeur and the defendant became intoxicated. While chauffeur was driving erratically with the defendant remaining in the backseat, the vehicle crossed centre line and collided with incoming vehicle killing the chauffeur and the occupants of oncoming vehicle. The defendant was found guilty of reckless driving in that he aided and abetted the chauffeur by not preventing the reckless, dangerous and intoxicated driving.

R. v. Halmo, [1941] O.R. 99 (Ont. C.A.) See other examples cited therein.

- (3) Where the owner of a car sat in the seat beside the driver who was exceeding the speed limit, he was guilty as an aider and abettor because he failed to make any effort to stop the offence when he had the authority to do so.

R. v. Kulbacki, [1966] 1 C.C.C. 167 (Man. C.A.)

- (4) When the defendant, who was in effect the owner of the car, allowed his friend to drive it while both were intoxicated, the car was involved in an accident. It was not clear whether the defendant or his friend was actually driving at the time of the accident. The defendant was held to have aided and abetted his friend, who was likely driving at material time. He should not have allowed his companion to drive if impaired. Operation of the vehicle for period of several hours by both parties while they were intoxicated constituted a common unlawful purpose in which each assisted the other and the resulting fatal accident was a probable, if not inevitable, consequence of carrying out such common purpose.

R. v. Lachance (1962), 132 C.C.C. 202 (Man. C.A.)

## PROSECUTOR

### Introduction

The authority of the Attorney-General flows from the Royal Prerogative. The Attorney-General may delegate portions of his or her power to appointed agents who may then act on his or her behalf within the scope of their appointment.

### Provincial Prosecutors

The **Crown Attorneys' Act**, R.S.O. 1990, C. 49 provides as follows:

6. (1) The Attorney General may by order authorized persons appointed under the Public Service Act to be provincial prosecutors.
  - (2) A provincial prosecutor may be a person who is not a member of the bar. R.S.O. 1980 c. 107 s. 7(1),(2)
  - (3) A provincial prosecutor shall act anywhere in Ontario as directed by the Director of Crown attorneys of the Ministry of the Attorney General.
  - (4) A provincial prosecutor shall conduct such prosecutions for provincial offences and offences punishable of summary conviction as are delegated to him by the Crown attorney for the county or provisional judicial district in which the provincial prosecutor acts and shall be subject to the direction and supervision of the Crown attorney.
  - (5) Every provincial prosecutor before he enters upon his duties shall take and subscribe before a Crown attorney the following oath:

I swear that I will truly and faithfully, according to the best of my skill and ability, execute the duties, powers and trusts of provincial prosecutor for Ontario without favour or affection to any party: So help me God. R.S.O. 1980 c. 107 s. 7(3)-(5)
11. Every Crown attorney and every provincial prosecutor is the agent of the Attorney General for the purposes of the **Criminal Code** (Canada). R.S.O. 1980, c.107, s.11



"Prosecutor" means the Attorney General or, where the Attorney General does not intervene means the person who issues a certificate or lays an Information and includes counsel or agent acting on behalf of either of them.

Provincial Offences Act s.1(1)

### **Crown Counsel's Authority**

Counsel who act on behalf of the Crown are presumed to have the due and proper authority in the absence of evidence to the contrary. If this authority is challenged a letter received from the Attorney General or Deputy would probably be sufficient.

Lemay v. the King (1952), 102 C.C.C. 1 (S.C.C.)

Ex parte Karchesy, [1967] 3 C.C.C. 272 affirmed by S.C.C. at [1968] 4 C.C.C. 128

R. v. Horncastle (1972), 8 C.C.C. (2d) 253 (N.B.C.A.)

R. v. Cassidy (1975), 18 C.C.C. (2d) 1 (N.B.C.A.)

R. v. Harrison (1977), 28 C.C.C. (2d) 279 (S.C.C.)

### **Duty of:**

"It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."

Boucher v. R. (1955), 110 C.C.C. 263 at 270 per Rand, J. (S.C.C.)

The conduct of a prosecutor is not that of an ordinary counsel. He is acting in a quasi-judicial capacity and ought to regard himself as part of the court and conduct himself accordingly, i.e., fairly and moderately.

R. v. Durocher (1963), 41 C.R. 350 (B.C.C.A.)

## **Prosecutorial Discretion**

The Crown prosecutor has the sole right to determine what charge(s) will be prosecuted. This discretion should not be interfered with by the judiciary.

R. v. Stark (1927), 47 C.C.C. 356 (Ont. C.A.)

R. v. Cooper (1977), 34 C.C.C. (2d) 18 (S.C.C.)

R. v. Verrette (1978), 40 C.C.C. (2d) 273 at 291 (S.C.C.)

A Judge has a duty to try the charges before him and not substitute his own views as to what charge ought to be laid e.g., by substituting a lesser charge without the consent of Crown.

Re Harvey (1957), 119 C.C.C. 124 (Ont. H.C.)

## **Personal Opinions**

It is improper for Crown counsel or defence counsel to express a personal opinion as to the guilt, innocence or character of an accused. Further Crown counsel should not use inflammatory language in describing an accused's conduct.

Boucher v. R. (1955), 110 C.C.C. 263 (S.C.C.)

R. v. Durocher (1963), 41 C.R. 350 (B.C.C.A.)

## **Denial of Crown's Right to Fair Trial**

A Judge should not prevent the prosecution from calling its witnesses nor unduly interrupt the presentation of the case for the prosecution. "And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost".

Jones v. National Coal Board, [1957] 2 Q.B. 55 per Lord Denning at 64 approved in R. v. Viger (1958), 122 C.C.C. 159 (Ont. C.A.)

The Judge has a duty to be impartial to the prosecution and should not interrupt the Crown's case to the point of impeding it.

R. v. Lafontaine (1979), 9 C.R. (3d) 263 (Que. S.C.)

## **Calling of Witnesses**

The prosecution has a discretion as to which witnesses it will call and it will not be interfered with unless exercised for some oblique motive. The prosecution must not hold back evidence because it may assist the defendant however it does not have to call



all persons who may be able to offer some evidence. The number and materiality of the witnesses is a matter for the prosecution and it should not discharge the functions of both the prosecution and defence.

Lemay v. R. (1951), 102 C.C.C. 1 (S.C.C.)

### **Stay of Proceedings**

The Attorney General or his agent may stay a proceeding at anytime before judgement. The proceeding may be recommenced with the consent of designated persons if within time. There is no need to prove an instruction was granted by the Attorney General personally. The direction to stay is made to the clerk of the court who has no discretion but to accept it, not to the judge.

**Provincial Offence Act:** s. 32(1),(2)

R. v. McKay (1979), 9 C.R. (3d) 378 (Sask. C.A.)

After a stay of proceedings has been entered, a new identical Information may be laid and proceeded with.

R. v. Judge of the Provincial Court, ex parte McLeod, [1970] 5 C.C.C. 128 (B.C.S.C.)

## THE RULE AGAINST MULTIPLE CONVICTIONS

### Introduction

The rule against multiple convictions (the rule from **Keinapple**) forms part of the general category of overlapping double jeopardy concepts known as *res judicata*, and is closely related to, though distinct from the concepts of *issue estoppel*, *autrefois convict* and *autrefois acquit*. Though the rule exists independently of the **Charter**, it reflects the general constitutional right under s. 7 to "fundamental justice" and also the right under s. 11(h) against re-trial or punishment after acquittal or conviction.

### Distinguished from other double jeopardy concepts.

The principle of *res judicata* prevents multiple convictions for the same *delict* or matter even where the matter forms the basis for two separate offences. *Autrefois acquit* and *autrefois convict* apply to convictions for the same or included offences and therefore apply to the charge rather than the delict or transaction.

Keinapple v. R., [1975] 1 S.C.R. 729

Generally in the past, where the multiple convictions arose out of the same circumstances *and* involved the same elements, the rule against multiple convictions was held to be violated.

Keinapple v. R., [1975] 1 S.C.R. 729  
(However, see below)

### Interpretations of the rule

Common Elements Approach: The Manitoba Court of Appeal in **R. v. Hagenlocker**, (1981), 65 C.C.C. (2d) 101 held that the court should focus its attention on the facts underlying the charges, and that where a single act underlay the charges, the rule would apply. The court held further that the application of the rule was not restricted to situations where the charges could be viewed as alternatives to each other.

R. v. Hagenlocker, (1981), 65 C.C.C. (2d) 101; aff'd 70 C.C.C. (2d) 41. (S.C.C.)

Facts used Approach: In applying the decision from **Hagenlocker**, the Ontario Court of Appeal in **Allison and Diné** again echoed the emphasis on the facts or circumstances rather than the elements. The court went further, however, in holding that where an act

forming the basis for an offence or a part of a series of acts which underlie an offence results in a conviction, that act cannot be used again to form the actual basis for another offence. This concept of facts "exhausting" themselves was subsequently rejected in **R. v. Prince**.

R. v. Allison and Dinel, (1983), 33 C.R. (3d) 333 (Ont. C.A.)

R.v. Prince, (1986), 30 C.C.C. (3d) 35, 70 N.R. 119, [1987] 1 W.W.R. 1 (S.C.C.)

### The Rule after Prince

In **Prince**, the accused stabbed a pregnant woman in the abdomen, causing the premature birth and subsequent death of the child. The accused was convicted of assault causing bodily harm to the mother. A motion to stay a subsequent charge of manslaughter in the death of the child was dismissed at trial, the judge holding that **Keinapple** was inapplicable. Ultimately, the Supreme Court held that the accused should be put to trial on the charge.

The court unanimously embraced the dual test of "factual" and "legal" nexus as enunciated by Dickson C.J.C. As his Lordship stated at pp. 43-4:

It is [therefore] a *sine qua non* for the operation of the rule against multiple convictions that the offence arise from the same transaction.....

....In most cases, I believe, the factual nexus requirement will be answered by the affirmative answer to the question: Does the same act by the accused ground each of the charges? As **Coté** demonstrates [[1975] 1 S.C.R. 303] however, it will not always be easy to define when one act ends and another begins. Not only are there peculiar problems associated with continuing offences, but there exists the possibility of achieving different answers to this question according to the degree of generality at which an act is defined....such difficulties will have to be resolved on an individual basis as cases arise, having regard to factors such as the remoteness or proximity of the events in time and place, the presence or absence of relevant intervening events...., and whether the accused's actions were related to each other by a common objective.

His Lordship continued at pp. 45-6, that in addition to the factual nexus, there must also exist a sufficient legal nexus between the offences. He then proceeded to reject the "common element" test for determining whether the rule is breached, in favour of a test which looks at "additional, distinguishing elements".

R.v. Prince, (1986), 30 C.C.C. (3d) 35, 70 N.R. 119, [1987] 1 W.W.R. 1 (S.C.C.)  
 R. v. Krug, [1985] 2 S.C.R. 255

The rule is subject to the right of Parliament to indicate when it is appropriate that there be more than one conviction where offences overlap. The presence of an additional, distinguishing element is evidence of such intent.

R.v. Prince, (1986), 30 C.C.C. (3d) 35, 70 N.R. 119, [1987] 1 W.W.R. 1 (S.C.C.)  
 R. v. Krug, [1985] 2 S.C.R. 255

Where offences are of unequal gravity, provided there are no distinct additional elements to the lesser offence, the rule may serve as a bar to conviction even where there are additional elements in the offence for which a conviction has been entered.

R.v. Prince, (1986), 30 C.C.C. (3d) 35, 70 N.R. 119, [1987] 1 W.W.R. 1 (S.C.C.)

However, in certain circumstances, there may be problems in ascertaining whether a certain element is additional or distinct. In **Prince**, the court provided a non-exhaustive list where certain elements, though different, might bear a sufficient correspondence as to trigger the rule:

Where Parliament particularizes an element of one offence in another similar offence, this should not be regarded as a distinguishing feature rendering the rule inapplicable. Parliament may create offences of varying degrees of generality to ensure that any failure of the drafters to envision every circumstance will not result in the accused escaping punishment.

Secondly, Parliament may allow for more than one method of proving a single delict embodied in separate offences.

R. v. Gushue, (1976), 14 O.R. (2d) 620, 32 C.C.C. (2d) 189 aff'd on other grounds, [1980] 1 S.C.R. 798

Third, where Parliament in effect deems a particular element to be satisfied by proof of a different nature on grounds of social policy or inherent difficulties of proof. Such was the case in **Keinapple**, where the element of proof that the victim's age was under 14 was held to be an alternative to satisfying the element of non-consent.

Keinapple v. R., [1975] 1 S.C.R. 729

As **Prince** significantly modifies and expands upon the Keinapple principle, care should be taken in dealing with authorities decided in the interim.

For cases dealing with the effect of the rule on specific offences, see "Annotations".

## STARE DECISIS

### Introduction

*Stare decisis*, or the doctrine of precedent, is a central principle governing courts in the common law system. It determines which issues of law decided by other courts a court is or is not bound to follow in resolving matters before it.

### Principle of *Stare Decisis*

The basic principle of *stare decisis* is that a court is bound by prior decisions on matters of law made by courts whose rulings that court is bound to follow. Generally, courts are bound by decisions of higher courts in the same province and the Supreme Court of Canada. Decisions of courts outside the province may have persuasive value, but are not binding precedents. Special principles determine the effect of prior decisions of the same level of court.

### Extent to which Decision Binding

A court is bound to apply the *ratio decidendi* of a precedent binding on it to the facts before it, unless the facts before it are distinguishable from those of the prior case. The *ratio decidendi* is the rule of law expressly or implicitly necessary for the conclusion reached by the higher court.

Ingram v. R. (1981), 14 M.V.R. 60 (Sask. Q.B.)

A decision that merely makes determinations of fact and does not contain a legal principle as an authoritative element is not a precedent that will trigger the doctrine of *stare decisis*.

Delta Acceptance Co. Ltd. v. Redman, [1966] 2 O.R. 37 (C.A.)

### Unreported Decisions

An unreported decision is as binding as a reported decision even if it consists of a simple endorsement.

R. v. Jack (1981), 17 M.V.R. 76 (Ont. Prov. Ct.)



## Courts of Co-Ordinate Jurisdiction

In Ontario, a judge of a court other than the Court of Appeal should consider himself or herself bound by prior decisions of the court in which he or she is sitting, or a court of co-ordinate jurisdiction, except in the most special circumstances and when there is strong reason to the contrary.

R. v. Morris, [1942] O.W.N. 447 (Ont. H.C.)

R. v. Kartna (1979), 2 M.V.R. 259 (Ont. H.C.)

"Special circumstances" or "strong reason to the contrary" do not include a situation where the court feels that the prior decision is wrongly decided. A court should only refuse to follow a prior decision where the prior decision failed to consider some relevant statute or authority, where subsequent decisions have impugned the authority of the prior decision, or (perhaps) where the prior decision was handed down in circumstances where the court did not have an opportunity to consult all relevant authority or render a full and reasoned decision.

R. v. Northern Electric Co. Ltd. (1955), 111 C.C.C. 241, 21 C.R. 45 (Ont. H.C.)

Re Hansard Spruce Mills Limited (1954), 13 W.W.R. 285 (B.C.S.C.)

Wolverine v. R., [1987] 3 W.W.R. 475 (Sask. Q.B.)

## Decisions of Higher Courts

What is a "higher court"? Generally, decisions of courts to which an appeal may be taken will bind courts that may be appealed from.

R. v. Morris, [1942] O.W.N. 447 (Ont. H.C.)

R. v. Rybansky (1982), 66 C.C.C. (2d) 459, 26 C.R. (3d) 91 (Ont. H.C.)

It seems that it is the position of the court in the scheme set by statute for dealing with the particular subject matter, and not the positions of courts as set out in the statute creating the courts, that determines the effect of precedent.

R. v. Smith (1988), 44 C.C.C. (3d) 385 (Ont. H.C.)

If this is correct, then all Ontario Courts (Provincial Division) dealing with trials under the **Provincial Offences Act** will be of co-ordinate jurisdiction, whether they are presided over by a justice of the peace or provincial judge. A General Division judge hearing a Part III appeal will be of co-ordinate jurisdiction with a provincial judge hearing an appeal from a justice of the peace under Part III, and decisions of both would be binding on all Ontario Courts (Provincial Division) hearing trial matters, whether presided over by a provincial judge or justice of the peace.

## Decisions of Higher Courts in Other Counties

The **Courts of Justice Act**, S.O. 1984, c.11, amalgamated all the former county and district counts into a single court, the District Court of Ontario. Accordingly, a decision of the District Court sitting as a summary conviction appeal court under Part XXIV of the **Criminal Code** is binding on all courts of the Provincial Court (Criminal Division) throughout Ontario sitting as summary conviction trial courts, not simply on those in the county or district where the decision was handed down.

R. v. Smith (1988), 44 C.C.C. (3d) 385 (Ont. H.C.)

By the same reasoning, decisions made on appeal from a trial court under the **Provincial Offences Act** are binding on **Provincial Offences Act** trial courts throughout the province, not simply on those in the same county or district.

## Conflicting Decisions

It appears that where a court is faced with conflicting decisions of higher courts of co-ordinate jurisdiction, each of which would normally be binding on it, it is free to follow the decision whose reasoning and result it prefers.

Hamilton v. Hamilton (1920), 27 O.L.R. 359 (H.C.)

## Higher Courts in Other Provinces

Trial courts in Ontario are not bound by decisions of appellate courts in other provinces, even when those decisions are interpreting a federal statute.

R. v. Beaney, [1970] 1 C.C.C. 48 (Ont. Co. Ct.)

R. v. Guertin (1971), 3 C.C.C. (2d) 135 (Ont. Dist. Ct.)

## Refusal of Leave to Appeal

A refusal of leave to appeal by an appellate court has no precedential value whatsoever, since leave may be refused for any number of reasons. Refusal of leave does not indicate agreement with any decision of fact or law made by the court sought to be appealed from.

R. v. Bachman (1987), 78 A.R. 282 (Alta. C.A.) aff'd on other grounds  
[1988] 1 S.C.R. 1094, 89 A.R. 199

## Ontario Court of Appeal

The Ontario Court of Appeal is not bound by one of its previous decisions where the liberty of the subject is involved and the court is convinced that the previous decision was wrongly decided against the subject.

R. v. Santeramo (1976), 32 C.C.C. (2d) 35 (Ont. C.A.)

R. v. McInnis (1973), 13 C.C.C. (2d) 471 (Ont. C.A.)

The Ontario Court of Appeal is bound by its own decisions favouring the liberty of the subject.

R. v. Maika (1974), 27 C.R.N.S. 115 (Ont. C.A.)

The Ontario Court of Appeal is not obligated to follow a judgment of another provincial appellate court, although it may do so if it is persuaded by the merits of the decision or there is some other good reason for following it. However, the integrity of the administration of the criminal law in this country requires that careful heed be given to such decisions.

R. v. Czipps (1979), 48 C.C.C. (2d) 166, 12 C.R. (3d) 193 (Ont.C.A.)

Wolf v. R. (1974), 17 C.C.C. (2d) 425, 27 C.R.N.S. 150 (S.C.C.)

Courts lower than the Ontario Court of Appeal are bound by rulings of that court even though the particular ruling was not necessary to dispose of the appeal.

Re McKibbin and R. (1981), 61 C.C.C. (2d) (Ont. H.C.J.)

The Ontario Court of Appeal has held in a civil case that trial courts are bound by its decisions, even if a decision was rendered *per incuriam* (i.e., without consideration of a relevant statutory provision or authority).

Leroux v. Co-operators General Ins. Co. (1991), 4 O.R. (3d) 609 (Ont. C.A.)

*Quaere*; if a trial court is bound by a decision of the Ontario Court of Appeal rendered *per incuriam* when not following the decision would lead to a result more favourable to the liberty of the subject.

## Supreme Court of Canada

When the Supreme Court of Canada expresses an opinion on a point of law, that ruling is binding on all lower courts even if it was not strictly necessary to dispose of the appeal.

Sellars v. R. (1980), 52 C.C.C. (2d) 345, 20 C.R. (3d) 381 (S.C.C.)

## STRICT/ABSOLUTE LIABILITY

### Introduction

Provincial legislatures have the authority to create either full *mens rea*, strict or absolute liability offences. Offences are usually classified into criminal and public welfare offences. Criminal offences are generally full *mens rea* offences, whereas public welfare offences are either offences of strict liability requiring objective fault, or offences of absolute liability requiring no fault. *Prima facie*, any provincial offence falls into the strict liability category and only clear legislative language can cause it to be classified otherwise.

R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299

Strasser v. Roberge, [1979] 2 S.C.R. 953

The rationale underlying all public welfare offences as opposed to criminal offences is the need to protect the public from dangers by imposing a duty to observe a certain standard of care upon those who carry on potentially harmful regulated activities. The justification for the reversal of the onus of proving due diligence can be justified in that the person who chooses to enter a regulated field is in the best position to prevent the harm which may result from their activities.

R. v. Wholesale Travel Group Inc., (1991), 67 C.C.C. (3d) 193 (S.C.C.)

### Definition of Strict Liability Offences

For a strict liability offence, the Crown must prove that the defendant committed the prohibited act. The defendant must then establish, on a balance of probabilities, that he took reasonable care in acting as he did, i.e., that he acted with due diligence.

R. v. Chapin, [1979] 2 S.C.R. 121, 45 C.C.C. (2d) 336

R. v. Rio Algom Ltd. (1988), 46 C.C.C. (3d) 242, 66 O.R. (2d) 674 (C.A.)

"Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances."

R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299



## Due Diligence/Mistake of Fact

It is open to a defendant to avoid liability for a strict liability offence by showing that he acted under an honest belief in a state of facts which, if they had been as he believed them to be, would have rendered his act innocent, or if he took all reasonable steps to avoid the particular event.

R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299

R. v. Chapin, [1979] 2 S.C.R. 121

R. v. Cancoil Thermal Corp. (1986), 52 C.R. (3d) 188 (Ont. C.A.)

R. v. Naugler (1981), 65 C.C.C. (2d) 25, 25 C.R. (3d) 392 (S.C. App. Div.)

The defence of due diligence or mistake of fact is available provided the accused acted reasonably. In other words, the mistake of fact must be honest and reasonable for a strict liability offence.

R. v. Chapin, [1979] 2 S.C.R. 121

## Examples

- (1) On a charge of hunting ducks within a quarter mile of the place where bait was deposited, the defendant argued that she did not know the bait was present, that it was not easily visible and that a reasonable person might well have been unaware of the existence of the bait. The court held that this offence was one of strict liability and the defendant was duly acquitted as she had shown she had exercised due diligence in her hunting practices.

R. v. Chapin (1979), 45 C.C.C. (2d) 333 (S.C.C.)

- (2) On a charge of failing to ensure that industrial safety procedures were carried out, the defendant employer satisfied the onus of due diligence by illustrating how he advised, instructed and cautioned the employee as to the proper procedure and therefore had taken all reasonable steps to prevent the occurrence.

R. v. Z-H Paper Product Ltd. (1979), 27 O.R. (2d) 570 (Ont. H.C.)

- (3) However, a defence to a strict liability offence put forward on the basis of a reasonable belief in a mistaken set of facts cannot prevail where the defendant simply proves that he was mistaken in believing there was no possibility of harm or injury to his employees.

R. v. Rio Algom Ltd. (1988), 46 C.C.C. (3d) 242

## Other Defences to Strict Liability Offences

Provincial legislation which renders an accused strictly liable for committing certain actions may be answered by such other defences as:

### 1. Necessity

R. v. Pootlass (1977) 1 C.R. (3d) 378 (B.C. Prov. Ct.)

R. v. Slovack, [1980] 1 W.W.R.

See also **Necessity**, *supra*.

### 2. Impossibility

R. v. Church of Scientology of Toronto (1974), 18 C.C.C. (2d) 546

See also **Impossibility**, *supra*

### 3. Self-defence

R. v. Slovack, [1980] 1 W.W.R. 368 (Alta. Prov. Ct.)

## Party to a Strict Liability Offence

A person cannot be convicted of aiding and abetting a strict liability offence unless he has actual knowledge of the facts giving rise to the offence.

R. v. F.W. Woolworth Co. Ltd. (1974), 18 C.C.C. (2d) 23 (Ont. C.A.)

## Definition of Absolute Liability Offences

"...absolute liability entails conviction on proof merely that the defendant committed the prohibited act constituting the *actus reus* of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in every sense, yet be branded as a malefactor and punished as such."

R. v. Sault Ste. Marie (1978), 40 C.C.C. (2d) 353 at 362 (S.C.C.)



For an absolute liability offence, it is not open to an accused to exculpate himself by showing that he was free of mental fault; that he was ignorant of or mistaken as to the factual elements of the offence.

R. v. Roche (1985), 20 C.C.C. (3d) 524, 46 C.R. (3d) 160 (Ont. C.A.)

For absolute liability offences, unlike strict liability offences, a reasonable mistake of fact affords no defence.

R. v. Trophic Canada Ltd. (1980), 57 C.C.C. (2d) 1 (B.C.C.A.)

### **Test to Determine Whether Offence Strict Liability/Absolute Liability**

Courts should be reluctant to find that a statute gives rise to an absolute liability offence especially when the penalty is of any consequence. Mere difficulty of prosecution or enforcement is not sufficient to move a *prima facie* strict liability offence into the absolute liability category. The overall regulatory pattern adapted by the legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the absolute liability category.

R. v. Higgins (1981), 60 C.C.C. (2d) 247

R. v. Sault Ste. Marie (1978), 40 C.C.C. (2d) 353 (S.C.C.)

### **Wording of Absolute Liability Offence**

A statute which uses words such as "shall be deemed to be in contravention" indicates an absolute liability offence but the words "shall ensure" are not clear enough to indicate absolute liability.

R. v. Z-H Paper Products Limited. (1979), 27 O.R. (2d) 570 (Ont. Div. Ct.)

### **Example of Absolute Liability Offence**

Failing to stop for a stop sign, and speeding, contrary to the Highway Traffic Act are both absolute liability offences.

R. v. Walker (1980), 48 C.C.C. (2d) 129 (Ont. Co. Ct.)

R. v. Naugler (1981), 65 C.C.C. (2d) 25, 25 C.R. (3d) 392 (S.C. App. Div.)

### Defences to Absolute Liability Offences

Those offences which have been classified as absolute liability offences may be answered by a number of general defences including: automatism, duress, necessity, insanity, *de minimis non curat lex*, and self-defence.

R. v. Metro News Ltd. (1986), 53 C.R. (3d) 289 (Ont. C.A.)

R. v. Cancoil Thermal Corp (1986) 52 C.R. (3d) 188 (Ont. C.A.)

R. v. Webster (1981), 10 M.V.R. 310 (Ont. Dist. Co.)

R. v. Allen (1979), 59 C.C.C. (2d) 563 (Ont. Dist. Ct.)

### Defences to Mens Rea Offences

When a defendant is charged with a provincial offence that requires the proof of *mens rea*, the defences normally available for true crimes are equally available to a provincial offence.

R. v. Abbey, [1982] 2 S.C.R. 24

R. v. Prue; R. v. Baril, [1979] 2 S.C.R. 547

R. v. Lucki (1955), 17 W.W.R. 446 (Sask. Police Ct.)

Unlike a strict liability offence, when one argues mistake of fact as a defence to a full mens rea crime, the belief need not be reasonably held, but must be honestly held. The honesty of the mistaken belief, however, may be assessed on objective grounds.

Pappajohn v. R., [1980] 2 S.C.R. 120, 52 C.C.C. (2d) 481

Sansregret v. R., (1985), 18 C.C.C. (3d) 223, 45 C.R. (3d), [1985] 1 S.C.R. 570 (7:00)







## TABLE OF CONTENTS

## PROCEDURE

ADJOURNMENTS .....	P1-1
Introduction .....	P1-1
Provincial Offences Act .....	P1-1
Loss of Jurisdiction .....	P1-1
Failure of Defendant to Attend .....	P1-2
Adjournments to Secure Counsel .....	P1-2
Adjournments to Secure Witnesses .....	P1-3
Adjournments in Provincial Courts (Criminal Division) .....	P1-3
Procedure on Adjournments .....	P1-5
 ATTENDANCE OF DEFENDANT .....	 P2-1
Introduction .....	P2-1
Provincial Offences Act .....	P2-1
Summons from Another Justice .....	P2-1
Issuance of a Warrant .....	P2-1
Process Upon an Amended Information .....	P2-1
Errors In Wording of Summons .....	P2-2
Process Returnable on Incorrect Day .....	P2-2
Service on a Corporation .....	P2-2
Summons After Limitation Period .....	P2-2
Dispute Without Appearance .....	P2-3
Defective Service of a Summons or Other Process .....	P2-3
Waiver of Defects in Service .....	P2-3
Appearance at Court Office .....	P2-3
Appearance to Attack the Process .....	P2-4
Failure of Defendant to Appear .....	P2-4



ATTENDANCE OF WITNESSES .....	P3-1
Introduction .....	P3-1
Provincial Offences Act .....	P3-1
Issuance of Summons .....	P3-1
Production of Documents .....	P3-1
Witness in Custody .....	P3-2
Warrant Rather Than Summons .....	P3-2
Quashing a Summons .....	P3-2
Summons Served on Defence Counsel .....	P3-2
Summons Served on Crown Counsel .....	P3-2
Effect of Non-Attendance of Summonsed Witness .....	P3-3
 CERTIFICATE OF OFFENCE .....	 P4-1
Introduction .....	P4-1
Provincial Offences Act .....	P4-1
Availability .....	P4-1
Commencement of Proceedings .....	P4-1
Date of Filing .....	P4-2
Name of Court .....	P4-2
Errors in Preprinted Form .....	P4-3
Validity of Charge .....	P4-3
Defects which Nullify the Certificate .....	P4-3
Signature of Person Charged .....	P4-4
Signature of Issuing Provincial Offences Officer .....	P4-4
Amendments to Certificates of Offence .....	P4-4
 DUPLICITY .....	 P5-1
Introduction .....	P5-1
Provincial Offences Act .....	P5-1
The Test .....	P5-1
Effect of Finding of Duplicity .....	P5-2
 EXCLUSION OF WITNESSES .....	 P6-1
Introduction .....	P6-1
Purpose .....	P6-1
Scope of the Order .....	P6-1
Exceptions to the Order .....	P6-2
Effect of Witness Remaining in Courtroom .....	P6-2
Communication With Excluded Witness .....	P6-3

INFORMATION .....	P7-1
Introduction .....	P7-1
Provincial Offences Act .....	P7-1
Who May Be An Informant .....	P7-1
Duties of the Justice .....	P7-1
Omission of Date in Jurat .....	P7-3
Illegible Signature in Jurat .....	P7-4
Use of Stamp to Affix Signature .....	P7-4
Failure to Complete Summons Return .....	P7-4
Defects Within Informations .....	P7-4
Name of Defendant .....	P7-5
Time of Offence .....	P7-5
Place of Offence .....	P7-6
Single Transaction .....	P7-6
Factual Sufficiency .....	P7-8
Statement of Offence .....	P7-9
Mode of Participation .....	P7-10
Specification of Statute .....	P7-10
Incorrect Section Number .....	P7-10
Amendment of Information .....	P7-10
Time of Amendment .....	P7-11
 JOINDER OF COUNTS .....	 P8-1
Introduction .....	P8-1
Provincial Offences Act .....	P8-1
Tests for Joinder .....	P8-1
Joinder of Criminal Code and Provincial Offences .....	P8-1
Further References .....	P8-2
 JOINDER OF DEFENDANTS .....	 P9-1
Introduction .....	P9-1
Provincial Offences Act .....	P9-1
The General Principle .....	P9-1
Tests for Joinder .....	P9-1
Further References .....	P9-1

JURISDICTION OVER OFFENCE .....	P10-1
Introduction .....	P10-1
Provincial Offences Act .....	P10-1
Courts of Justice Act .....	P10-1
Territorial Jurisdiction .....	P10-1
Change of Venue .....	P10-2
Offence in Several Jurisdictions .....	P10-3
Jurisdiction of the Justice .....	P10-3
Information Not Before Court .....	P10-3
Seizure of Jurisdiction .....	P10-3
 JURISDICTION OVER OFFENDER .....	 P11-1
Introduction .....	P11-1
Provincial Offences Act .....	P11-1
Upon Adjournments .....	P11-1
Trial <i>Ex Parte</i> .....	P11-1
Power to Require Continuing Attendance .....	P11-3
Further References .....	P11-3
 LIMITATION PERIOD .....	 P12-1
Introduction .....	P12-1
Provincial Offences Act .....	P12-1
When Proceedings Commenced .....	P12-1
Commencement After Limitation Period .....	P12-1
Time Period in Information Partly Outside Limitation Period .....	P12-2
Continuing Offences .....	P12-2
Amendment of Information After Limitation Period .....	P12-2
 MOTION FOR NONSUIT .....	 P13-1
Introduction .....	P13-1
Tests .....	P13-1
Circumstantial Evidence .....	P13-2
Procedure .....	P13-2
Motion By Court .....	P13-2
Co-Defendant Seeking Nonsuit .....	P13-3
Included Offences .....	P13-3
Crown May Reopen Case .....	P13-3
Defence Calling No Evidence .....	P13-3

OFFENCE NOTICE .....	P14-1
Introduction .....	P14-1
Provincial Offences Act .....	P14-1
Validity .....	P14-1
 PARKING INFRACTIONS .....	 P15-1
Introduction .....	P15-1
Provincial Offences Act .....	P15-1
Sufficiency of Certificate .....	P15-1
 PARTICULARS .....	 P16-1
Introduction .....	P16-1
Provincial Offences Act .....	P16-1
Purpose of Particulars .....	P16-1
Parties to an Offence .....	P16-2
Discretionary Order .....	P16-2
When Particulars Can Be Ordered .....	P16-2
Crown Unable to Supply Details .....	P16-3
Statement of Crown Not Particulars .....	P16-3
Demand for Evidence .....	P16-3
Effect of Particulars .....	P16-3
Certificate of Offence .....	P16-4
 PLEAS .....	 P17-1
Introduction .....	P17-1
Provincial Offences Act .....	P17-1
Pleas Available .....	P17-1
Refusal to Plead .....	P17-1
Effect of Guilty Plea .....	P17-1
Factual Foundation of Guilty Plea .....	P17-2
Withdrawal of Guilty Plea .....	P17-2
Examples of Permitted Changes of Plea .....	P17-3
Examples of Refusal to Allow Change of Plea .....	P17-3
Plea to a Lesser Offence .....	P17-4
Guilty with an Explanation .....	P17-4
Previous Guilty Plea Admissible .....	P17-5
Refusal to Accept Plea on Other Counts .....	P17-5
Effect of Guilty Plea on Sentence .....	P17-6
Plea by Counsel .....	P17-6

SENTENCE .....	P18-1
Introduction .....	P18-1
Provincial Offences Act .....	P18-1
Proof of Prior Convictions .....	P18-1
Availability of Discharge .....	P18-1
Relief Against Minimum Fine .....	P18-1
Sentences of Imprisonment .....	P18-2
 SEVERANCE OF COUNTS .....	 P19-1
Introduction .....	P19-1
Provincial Offences Act .....	P19-1
The General Principle .....	P19-1
Test .....	P19-1
Onus .....	P19-2
Discretionary Order .....	P19-2
Arguments for Severance .....	P19-2
Additional Grounds to Oppose Severance .....	P19-3
Charter Issues .....	P19-3
 SEVERANCE OF DEFENDANTS .....	 P20-1
Introduction .....	P20-1
Provincial Offences Act .....	P20-1
The General Principle .....	P20-1
Test .....	P20-1
Matter of Discretion .....	P20-2
Timing of Application .....	P20-2
Common Enterprise .....	P20-2
Language of Co-Defendant .....	P20-3
Unequal Strength of Evidence .....	P20-3
Grounds Advanced for Separate Trials .....	P20-3
Additional Grounds Against Separate Trials .....	P20-5
 STAY OF PROCEEDINGS .....	 P21-1
Introduction .....	P21-1
Provincial Offences Act .....	P21-1
Entry of Stay .....	P21-1
Recommencement .....	P21-1

SURPLUSAGE .....	P22-1
Introduction .....	P22-1
Provincial Offences Act .....	P22-1
The General Rule .....	P22-1
The Proviso .....	P22-1
Examples of Surplusage .....	P22-2
Wrong Section Number of Statute .....	P22-2
 WITHDRAWAL OF CHARGES .....	 P23-1
Introduction .....	P23-1
Provincial Offences Act .....	P23-1
Crown Only to Withdraw .....	P23-1
Prior to Plea .....	P23-1
After Plea .....	P23-1
Effects of a Withdrawal .....	P23-2
Compared to a Stay of Proceedings .....	P23-2
 YOUNG OFFENDERS .....	 P24-1
Introduction .....	P24-1
Provincial Offences Act .....	P24-1
Definition of "Young Person" .....	P24-1
Process .....	P24-1
Notice to Parents .....	P24-1
Arrest .....	P24-2
Trial .....	P24-2
Sentence Options .....	P24-2





## ADJOURNMENTS

### Introduction

Granting of a request for an adjournment is a matter for the discretion of the court. This discretion is seldom interfered with on appeal unless it was not exercised judicially or a full hearing on the issue was not held.

Barrette v. R. (1976), 29 C.C.C. (2d) 189, 33 C.R.N.S. 377 (S.C.C.)

### Provincial Offences Act

See sections 31, 37, 49, 53 and 54.

### Loss of Jurisdiction

The court does not lose jurisdiction over an information or certificate if it fails to comply with the provisions of the **Provincial Offences Act** governing adjournments. New process can be issued to regain jurisdiction over the defendant and compel him to appear.

Provincial Offences Act, s. 31

When a court adjourns a matter orally to a certain date and then inadvertently endorses an incorrect date on the information, jurisdiction over the offence is not lost. It seems that the oral adjournment in the presence of the parties governs, and the Court has the power and duty to correct any inadvertent errors in recording this in the minutes of adjournment.

R. v. Wick (1975), 20 C.C.C. (2d) 203 (Sask. Q.B.)

When a matter is inadvertently adjourned to a day on which the court does not sit, such as a Sunday, it is considered to have been adjourned to the next following juridical day, at least in the absence of prejudice to the defendant.

Re Brand and R. (1974), 20 C.C.C. (2d) 253 (Alta S.C.T.D)

Whenever a defendant appears before the proper court, even conditionally, under protest, or by agent, jurisdiction is thereby regained over his person.

R. v. Gougeon et al. (1981), 55 C.C.C. (2d) 218 (Ont. C.A.)

Re Harnish and R. (1980), 49 C.C.C. (2d) 190 (N.S.C.A.)

### Failure of Defendant to Attend

Section 54 of the **Provincial Offences Act** allows a court to adjourn a matter for *ex parte* hearing at a later date without issuing a summons or a warrant for the defendant to attend on that date.

R. v. Szoboszloi, [1970] 5 C.C.C. 366 (Ont. C.A.), leave to appeal to S.C.C. refused *ibid*

R. v. Lainas, unreported, Ont. H.C., Sept. 2, 1986, per Steele J.

### Adjournments To Secure Counsel

Where a defendant wishes to be represented by counsel, then unless the defendant has deliberately failed to retain counsel or has discharged counsel with the intention of delaying the proceedings, the court should afford the defendant a reasonable opportunity to retain counsel. Where a request for an adjournment in order to do so is made in good faith and is reasonable, it should be granted.

R. v. Smith (1989), 52 C.C.C. (3d) 90 (Ont. C.A.)

However, the request must be reasonable. It would appear that such a request is not reasonable where a firm trial date has been set before counsel is retained and the sole ground for requesting an adjournment is that a particular counsel that the defendant desires is unavailable on that day.

R. v. Taylor (unreported, Ont. H.C., Feb. 11, 1980, per Eberle J.)

Re R. and Chimienti (1980), 17 C.R. (3d) 306 (Ont. H.C.)

Similarly, a request may be refused where a defendant has set a trial date and then failed to retain counsel despite having had ample opportunity to do so.

R. v. Manhas (1980), 17 C.R. (3d) 331 (B.C.C.A.), affirmed *ibid* at 348 (S.C.C.)

An adjournment of a trial may be refused for a defendant who was responsible for the failure to have counsel present, such as where the defendant had discharged his previous counsel without ensuring that replacement counsel was available for a trial date already set.

R. v. Harrison and Alonzo (1982), 67 C.C.C. (2d) 401 (Alta. C.A.)

Conversely, there is a duty on a counsel's part not to agree to act for a defendant when other prior commitments preclude that counsel from acting on the date fixed for trial of the defendant.

R. v. Harrison and Alonzo (1982), 67 C.C.C. (2d) 401 (Alta. C.A.)

Although counsel's failure to attend may constitute contempt, a defendant should not be forced to proceed if counsel is not present through no fault of the defendant. If there is evidence to show that a defendant arranged for, or agreed to, his counsel's absence in order to delay the proceedings, the defendant may be denied an adjournment and forced to proceed.

Barrette v. R. (1976), 29 C.C.C. (2d) 189, 33 C.R.N.S. 377 (S.C.C.)

### **Adjournments to Secure Witnesses**

In order to obtain an adjournment on the ground of the unavailability of a witness, a party must ordinarily establish:

- (i) that the absent witness is a material witness;
- (ii) that the party seeking the adjournment has not been guilty of laches or neglect in omitting to procure the attendance of the witness; and
- (iii) that there is a reasonable expectation that the witness can be procured at the future time to which it is sought to put off the trial.

Darville v. R. (1956), 116 C.C.C. 113 (S.C.C.)

Where a witness has been properly subpoenaed and has failed to attend, it is an error in law for a court to refuse to grant an adjournment.

R. v. Casey (1987), 80 N.S.R. (2d) 247 (C.A.)

R. v. Tallcree (1989), 98 A.R. 343 (C.A.)

### **Adjournments in Provincial Courts (Criminal Division)**

In a notice reported at (1979), 22 O.R. (2d) Part 3, pages vi and vii, the following procedures were set out:

#### **Notice**

#### **Trial Dates and Adjournments in the Provincial Courts (Criminal Division)**

##### **1. Trial Dates in Provincial Courts (Criminal Division)**

When a date for trial has been fixed by the Provincial Court (Criminal Division) with the agreement of counsel for the Crown and for the defence, the trial will be expected to proceed on the date fixed. By consenting to the date, both counsel will be considered to have committed themselves to be present on

the date fixed and to have undertaken to make no other commitments that will render their attendance impossible.

## 2. Subsequent Dates for Trials and Appeals

In fixing subsequent dates for trials or appeals, the Supreme, County and District, and Provincial Courts will endeavour to ensure that their respective schedules do not make it impossible for counsel to honour undertakings which they have already given in fixing a date for trial in the Provincial Court (Criminal Division). It will be the responsibility of counsel to notify the presiding judge in the Supreme, County or District, or Provincial Court of the previous commitments which counsel has made in another court which might conflict with a proposed date for trial or for an appeal.

## 3. Adjournments

Once a trial date has been fixed, adjournments will only be granted in exceptional circumstances, e.g., the illness of a key witness, or the illness of Crown or defence counsel occurring so near to the date of trial that it would be impossible for other counsel satisfactory to the Crown or to the accused (as the case may be) to be properly briefed. Applications for adjournments should be made as soon as the need for an adjournment is apparent so as to assist in the utilization of court's time which has already been scheduled, in the event the adjournment is granted. Such applications must be made at least three days before the trial date so that the witnesses who have been subpoenaed can be notified that their attendance will no longer be required. The judge hearing the application will not necessarily be the judge before whom the trial is to proceed. Reasonable notice of an application for an adjournment must be given to the other parties including co-accused who are jointly charged. Appropriate arrangements will be made for such applications to be heard by the Provincial Courts (Criminal Division).

## 4. Default on part of Counsel

If counsel for the Crown or for the defence fails to attend on the date fixed for trial, the trial judge will require that such counsel attend before him and will have his explanation for his absence recorded. If the trial judge is not satisfied with his explanation, he will send a copy of the transcript to the Chief Judge of the Provincial Courts (Criminal Division) for forwarding to the Law Society of Upper Canada so that appropriate disciplinary proceedings can be taken. Similarly, if counsel for the Crown or for the defence has not applied for an adjournment in accordance with paragraph 3, where one was required, then on the date for trial the trial judge will cause the explanation of counsel for such default to be recorded. If he considers the default to be serious, he will send a copy of the



transcript to the Chief Judge of the Provincial Courts (Criminal Division) so that he can, in turn, forward it to the Law Society of Upper Canada for appropriate action.

Whether or not this Practice Direction is still technically in force, it is submitted that it represents good practice and should be followed whenever possible.

### **Procedure on Adjournments**

As a matter of good practice, and particularly in order to resist a later application under s. 11(b) of the **Charter**, the following information should be placed on the record whenever a request for an adjournment is made:

- (i) the party requesting the adjournment;
- (ii) the reason for requesting the adjournment;
- (iii) the position of the other party or parties with respect to the adjournment (including any co-defendants);
- (iv) if counsel have agreed to a new date, an indication whether the new date was the first available date or if the Crown was able to offer the defence earlier dates;
- (v) if possible, where the defence has requested the adjournment, a waiver of rights under s. 11(b) with respect to the period of the adjournment.

A short written note of these points should be made on the Crown brief, in case it is difficult or impracticable to secure a transcript at a later date.





## ATTENDANCE OF DEFENDANT

### Introduction

The purpose of any type of process is simply to bring the defendant before the court. This is usually done by serving either an offence notice or a summons on a defendant. Once in the courtroom the defendant is entitled to be present throughout the proceedings unless compelling reasons exist to the contrary.

### Provincial Offences Act

See sections 3, 4, 5, 6, 7, 8, 9, 22, 24, 26, 27, 50, 51, 52, 54 and 90.

### Summons From Another Justice

When a justice of the peace refuses to issue process on an information, an informant is entitled to attend upon another justice to see if that justice will issue process. Alternatively, if he has additional evidence, the informant can reattend before the Justice who initially refused to issue process.

R. v. Allen (1974), 20 C.C.C. (2d) 447 (Ont. C.A.)

The justice who issues the summons need not be the same justice before whom the information was sworn.

R. v. Southwick, ex parte Gilbert Steel Ltd., [1968] 1 C.C.C. 356 (Ont. C.A.)

### Issuance of a Warrant

If a statute authorizes the arrest of a defendant, a justice of the peace may issue an arrest warrant. However, a warrant should be issued only where it is clear that a summons will not be effective.

R. v. Wentworth Magistrate's Court, ex parte Reeves, [1964] 2 O.R. 316 (Ont. H.C.)

### Process Upon an Amended Information

It is not necessary to issue new process after a defective information (or certificate of offence) is amended.

R. v. Peacock, [1954] O.W.N. 169 (Ont. H.C.)

## Errors in Wording of Summons

Section 26(1)(b) of the **Provincial Offences Act** requires a summons to "set out briefly the offence in respect of which the defendant is charged". Section 90 provides that the validity of any proceeding is not affected by any irregularity or defect in the substance or form of the summons or other process. Where the defendant has been misled by such a defect, the appropriate remedy is an adjournment.

A summons was valid although the offence was misspelled as "Careless Driving". Since the summons contained the appropriate section number along with the incorrectly worded charge, it gave the defendant sufficient notice of the offence with which he was charged.

R. v. Dodge, [1966] 1 O.R. 633 (Ont. H.C.)

## Process Returnable On Incorrect Day

When a summons or other process is made returnable on an incorrect day (for example, a day when the court is not sitting), jurisdiction over the defendant can be regained by the issuance of another summons or even by a warrant.

R. v. MacAskill (1981), 58 C.C.C. (2d) 361 (N.S.C.A.)

Re Littlejohn and R. (1982), 65 C.C.C. (2d) 486 (B.C.C.A.)

## Service on a Corporation

It appears from the wording of s. 26 of the **Provincial Offences Act** that the only acceptable process to serve on a corporation is a summons under Part III. This may be served personally upon certain named office holders, by registered mail to the corporate address or substitutionally. Personal service upon a regular employee not specified in section 26 is not sufficient.

R. v. Justice of the Peace, ex parte Peel Construction Co. Ltd., [1970] 3 O.R. 688 (Ont. H.C.)

R. Laidlaw Transport Ltd. and R., [1973] 3 O.R. 1014 (Ont. H.C.)

## Summons After Limitation Period

Provided the information was laid within the limitation period, a summons or an arrest warrant can be issued, served or executed outside the limitation period.

R. v. Southwick, ex parte Gilbert Steel Ltd., [1968] 1 C.C.C. 356 (Ont. C.A.)

Re Smerchanski et al. and R. (1979), 46 C.C.C. (2d) 54 (Man. Q.B.)

## **Dispute Without Appearance**

The written dispute procedure is not in effect in any part of Ontario. No enabling regulations have been proclaimed as of January, 1992.

## **Defective Service of a Summons or Other Process**

A defect in the service of any process, such as a summons or offence notice, only allows a defendant to seek an adjournment. Even if the process does not comply with the statutory requirements, jurisdiction over the offence is not lost. If the defendant has appeared in court, the matter should proceed to adjudication (subject to the defendant's right to an adjournment if he has been misled or prejudiced by the defect). If the defendant does not appear, new process should issue.

Re R. and Peters (1982), 63 C.C.C. (2d) 106 (Sask. Q.B.)

R. v. Graham (October, 1982) (Ont. S.C.)

R. v. Golden (unreported, Ont. Prov. Ct., Jan 28, 1985, per Montgomery P.C.J.,  
aff'd Ont. C.A., Jan. 20, 1989, per Brooke, Robins and Grange JJ.A.)

The failure of a provincial offences officer to sign the offence notice served on a defendant at the scene is an irregularity or defect in substance or form within the meaning of s. 90(1) of the **Provincial Offences Act**. It does not affect the validity of the proceedings.

R. v. Elliott (1981), 12 M.V.R. 35 (Ont. C.A.)

## **Waiver of Defects in Service**

Any appearance by a defendant in court, whether personally or by counsel, after defective service constitutes a waiver of any defects there may have been in the service.

R. v. Doherty (1899), 3 C.C.C. 505 (N.S.S.C.)

R. v. Johnson (1920), 34 C.C.C. 98 (Ont. S.C.)

Grice v. R. (1957), 26 C.R. 318 (Ont. S.C.)

Re Harnish and R. (1979), 49 C.C.C. (2d) 190 (N.S.C.A.)

## **Appearance at Court Office**

A defendant who appears at the correct court office to enter a plea and set a trial date attorns to the jurisdiction of the court even though the offence notice has a defect in form.

R. v. Callahan (1983), 21 M.V.R. 127 (Ont. H.C.)

### Appearance to Attack the Process

Unless the defect relates to jurisdiction over the offence (e.g., the process was returnable in the wrong territorial area), any appearance by the defendant gives the court authority to proceed with the matter. If the defendant makes a conditional appearance personally or by means of a representative who claims to act only as *amicus curiae* in order to attack some defect in the process, jurisdiction over the defendant is retained. Any appearance even under protest, in response to a defective but not jurisdictionally invalid process allows the court to proceed with the matter.

Grice v. R. (1957), 26 C.R. 318 (Ont. S.C.)

Re Harnish and R. (1979), 49 C.C.C. (2d) 190 (N.S.C.A.)

R. v. Gougeon, Haesler, Gray (1981), 55 C.C.C. (2d) 218 (Ont. C.A.)

### Failure of Defendant to Appear

If the defendant has been properly served with process but fails to appear, the court may proceed to hold a trial or may adjourn the matter over to a new date for trial. Where the matter is adjourned, there is no requirement that the court issue a summons or process for the new date.

R. v Szobozloi, [1970] 5 C.C.C. 366 (Ont. C.A.), leave to appeal to S.C.C. refused *ibid*

R. v Lainas, unreported, Ont. H.C., Sept. 2, 1986

The provisions of the **Provincial Offences Act** permitting trials to be held *ex parte* do not violate ss. 7 or 11(d) of the **Charter**, even where imprisonment is a possible penalty.

R. v Felipa (1986), 40 M.V.R. 316 (Ont. C.A.)

## ATTENDANCE OF WITNESSES

### Introduction

The usual method for procuring the attendance of a witness is the issuance and service of a summons.

### Provincial Offences Act

See sections 26, 39, 40, 41 and 42

### Issuance of Summons

A summons may only be issued to compel the attendance of a person who is likely to give material evidence. The justice issuing the summons has a discretion to determine if the person sought to be summonsed is likely to give material evidence, and may make enquiries to determine if there is a factual basis for the issuance of the summons.

Re R. and McConnell (1977), 35 C.C.C. (2d) 435 (Sask. C.A.), leave to appeal to S.C.C. refused October 17, 1977

The justice should exercise this discretion judiciously if not judicially. The steps that should be taken by the justice will depend on the circumstances of the particular situation. However, taking no steps whatsoever to ascertain whether the person ought to be summonsed is an abuse of discretion, and the summons may be set aside on an application for judicial review.

Foley v. Gares (1989), 53 C.C.C. (3d) 82 (Sask. C.A.)

### Production of Documents

Section 39 of the **Provincial Offences Act** allows a justice to compel a witness to bring to a hearing any writing or other thing that the witness has in his possession or under his control relating to the subject-matter of the proceeding. This is sometimes referred to as a "summons *duces tecum*".

Where a witness objects to complying with such a requirement, the objection must be made to the court issuing the summons. The court will rule on the materiality of the documents, or on any applicable claim of privilege or confidentiality.

Re Ontario Securities Commission and Crownbridge Industries Inc. (1989), 70 O.R. (2d) 506 (Ont. C.A.)



### **Witness in Custody**

A summons issued by a justice of the peace may not be used to secure the attendance of a person who is being held in custody.

R. v Devasagayam (1990), 61 C.C.C. (3d) 404 (Ont. Gen. Div.)

The **Provincial Offences Act** s. 41 provides a special procedure for procuring the attendance of a witness who is being held in custody.

### **Warrant Rather Than Summons**

Only a judge has the authority to issue a warrant for a recalcitrant witness or a person evading service. However, if a witness who has been served does not attend or continue his attendance in court, a justice may issue a warrant.

Provincial Offences Act, s. 40

### **Quashing a Summons**

A summons may be quashed by a superior court on jurisdictional or other grounds such as an indirect or improper purpose.

Re R. and McConnell (1977), 35 C.C.C. (2d) 435 (Sask. C.A.)

Re Baldwin and Bauer and R. (1981), 54 C.C.C. (2d) 85 (Ont. H.C.)

### **Summons Served on Defence Counsel**

A summons served on a defence counsel will not be quashed if it was issued for a proper purpose, even though it may force a defendant to retain other counsel.

Re Cameron and R. (1980), 48 C.C.C. (2d) 222 (Sask. Q.B.)

### **Summons Served on Crown Counsel**

A summons served on Crown counsel in an effort to ascertain reasons for exercising prosecutorial discretion may be quashed, as such evidence will generally be irrelevant and not material.

Re Baldwin and Bauer and R. (1981), 54 C.C.C. (2d) 85 (Ont. H.C.)

An applicant seeking to summons a Crown counsel who has carriage of a particular prosecution must establish that the Crown counsel can give material evidence. It is not enough merely to make such an allegation, nor to examine the Crown counsel

with the hope of turning up such evidence. Fishing expeditions will not be permitted. Otherwise, the administration of justice could be randomly interrupted and thereby impaired.

Regina v. Stupp et al. (1982), 36 O.R. (2d) 206 (Ont. H.C.)

### **Effect of Non-Attendance of Summoned Witness**

Where a witness who has been properly summonsed fails to attend, an adjournment may be requested in order that the presence of the witness may be secured. It is an error in law for the court to refuse to grant the adjournment.

R. v. Casey (1987), 80 N.S.R. (2d) 247 (C.A.)

R. v. Tallcree (1989), 98 A.R. 343 (C.A.)



## CERTIFICATE OF OFFENCE

### Introduction

Part I of the **Provincial Offences Act**, which allows proceedings to be commenced by certificate of offence, is intended to provide a simple, expeditious procedure for dealing fairly with persons charged with provincial offences. It is intended to alleviate cost, inconvenience and hardship to defendants and to remedy some of the problems of an overworked court system.

R. v. Carson (1983), 20 M.V.R. 54 (Ont. C.A.)

This philosophy should be kept in mind when challenges to the validity of certificates of offence are made.

### Provincial Offences Act

See sections 3, 4, 13 and Regulations made thereunder.

### Availability

A provincial offences officer may use a certificate of offence under Part I or information under Part III to commence proceedings under the **Provincial Offences Act**. A private citizen may not use a certificate of offence to commence a proceeding.

Provincial offences officers, in exercising their discretion, should consider the effect of s. 12 of the **Provincial Offences Act** on Part I proceedings. Subsection 12(1) restricts the penalty the defendant would otherwise be subject to, while subsection 12(2) places further limitations on the consequences of conviction where the defendant was issued an offence notice (instead of a Part I summons).

### Commencement of Proceedings

Proceedings under Part I are commenced by filing the certificate of offence in the office of the appropriate court. This must be done as soon as practicable after service of the offence notice or summons, and within seven days of the date of service of the offence notice or summons (not, it should be noted, within seven days of the date of the offence).

R.R.O. 1990, Reg. 200, s. 11

Provincial Offences Act, ss. 3(1), 4

## Date of Filing

The date that a certificate of offence was filed with the clerk of the court must be endorsed on the certificate. At least where there is no ambiguity as to what the date refers to, there is no need for any endorsement to accompany the date.

R. v Franklin (unreported, Ont. Gen. Div., Dec. 3, 1991, per Mullen J.)

Where the day, month or year is missing from the date of filing, but it is clear from the date of the offence and the date the issue was raised in court that the certificate was filed within the seven day period, the certificate is not a nullity and should not be quashed. For example, a certificate bearing the date of filing "April 12" (with the year omitted) was not a nullity when the offence date was April 6, 1991 and the matter came before the court in September of 1991.

R. v Franklin (unreported, Ont. Gen. Div., Dec. 3, 1991, per Mullen J.)

## Name of Court

Prior to the coming into force of the **Courts of Justice Act, 1984**, there was no court known as the "Provincial Offences Court, Province of Ontario". Instead, by virtue of the **Provincial Courts Act** there was an individual court for each county (or judicial district, etc.) known as the "Provincial Offences Court of the County of...". It was held in a series of cases that a certificate which failed to name the court correctly (i.e. by county or district), but instead referred to "Provincial Offences Court, Province of Ontario", was not a nullity and could be cured by amendment.

R. v. Potter (1982), 17 M.V.R. 54 (Ont. H.C.)

R. v. Greenspan (1982), 17 M.V.R. 57 (Ont. Prov. Ct.) aff'd Sept. 16, 1982 (Ont. C.A.)

R. v. Matsuba (1982), 17 M.V.R. 221 (Ont. H.C.)

R. v. Arnold (1982), 17 M.V.R. 61 (Ont. H.C.)

This issue was made redundant by s. 68 of the **Courts of Justice Act, 1984**, which continued and amalgamated the Provincial Offences Courts of the counties and districts as a single court known as the Provincial Offences Court.

Courts of Justice Act 1984, S.O. 1984, c. 11

By virtue of the **Courts of Justice Amendment Act, 1989** the former Provincial Offences Court is now part of the Ontario Court (Provincial Division). It should be noted that a reference in a document filed in a court referring to the "Provincial Offences Court is deemed to be a reference to the "Ontario Court (Provincial Division)".

Courts of Justice Act 1984, S.O. 1984, c. 11, as amended by 1989, c. 55, s. 29

## Errors in Preprinted Form

A certificate which omitted the word "issuing" from the phrase "signature of issuing provincial offences officer" was defective in form, or at worst defective in substance, but was not a nullity and could be amended under s. 34(1) of the **Act**.

R. v. Thompson (1981), 12 M.V.R. 221 (Ont. H.C.)

This reasoning would presumably apply to other minor preprinted deviations from the prescribed form for the certificate of offence (and see also s. 28(d) of the **Interpretation Act**, R.S.O. 1990, c. I.11). The effect of other errors in certificates of offence and informations is discussed in "Information", *infra*.

## Validity of Charge

An offence charged in a certificate of offence may be designated in the words prescribed in regulations made under s. 13(1)(b) of the **Provincial Offences Act**, or described in accordance with s. 25 of the **Provincial Offences Act**.

Provincial Offences Act, s. 13

For a discussion of when a charge will be sufficient under s. 25, see "Information", *infra*.

## Defects which Nullify the Certificate

It is submitted that a certificate of offence which is not completed properly in significant matters is a nullity which will be quashed by the court examining it under s. 9. Minor technical errors such as a wrong date or an incorrect spelling of the defendant's name can be amended and do not render the certificate of offence a nullity. However, defects that will render the certificate liable to be quashed under s. 9(1) include:

1. no date of offence
2. no name of defendant
3. no location of offence
4. no offence known to law
5. no signature of issuing provincial offences officer
6. no set fine



### Signature of Person Charged

As a general principle, defects in the process used to bring the defendant before the court will not affect the validity of the proceeding where process made the defendant aware of his obligation to attend and the defendant did attend. The law does not permit conditional appearances or appearances under protest to attack the validity of the process.

R. v. Gougeon et al. (1981), 55 C.C.C. (2d) 218 (Ont. C.A.)

Section 3(4) of the **Provincial Offences Act** indicates that upon the service of an offence notice or summons, the charged person shall be requested to sign the certificate of offence, but failure to sign does not affect the validity of the certificate or the service of the offence notice or summons.

The request to the defendant to sign does not affect the validity of the charge before the court but instead is a provision respecting the service of process on the defendant. The failure of a police officer to request the defendant to sign the certificate is an irregularity or defect in substance or form within the meaning of s. 90(1) of the **Provincial Offences Act** that does not affect the validity of the proceeding.

R. v. Golden (unreported, Ont. Prov. Ct., Jan. 28, 1985, per Montgomery P.C.J., aff'd Ont. C.A., Jan. 20, 1989, per Brooke, Robins, and Grange J.J.A.)

R. v. Pall (unreported, Ont. Prov. Ct., Sept. 15, 1986, per Harris P.C.J.)

### Signature of Issuing Provincial Offences Officer

A failure by a provincial offences officer to sign the offence notice is an irregularity or defect in substance or form within the meaning of s. 90(1) of the **Provincial Offences Act** that does not affect the validity of the proceeding.

R. v. Elliott (1981), 12 M.V.R. 35 (Ont. C.A.)

### Amendments to Certificates of Offence

Amendments to certificates of offence are governed by the same provisions as amendments of informations. These are discussed in "Information", *infra*.

## DUPLICITY

### Introduction

At common law a rule developed against charging two offences within a single count. This rule is now enacted in s. 25(1) of the **Provincial Offences Act**.

Historically, the rule sought to ensure that a defendant knew precisely the offence with which he was charged. It also allowed the defendant to plead *autrefois* convict or *autrefois* acquit if a subsequent charge was laid arising out of the same incident. The Supreme Court of Canada examined this rationale in 1978 and put forward a revised analysis. Cases decided prior to 1978 must be approached with caution, since they no longer necessarily represent the law.

There is a distinction between the duplicity principle and the single transaction requirement (discussed in "Information", *infra*). The duplicity principle covers the legal basis of the charge while the single transaction requirement covers the factual basis of the charge.

### Provincial Offences Act

See sections 25(1), 25(8), 33(1) and 36(2).

### The Test

The test for duplicity, and the rationale for the test, were considered by the Supreme Court of Canada in 1978. In **R. v. City of Sault Ste. Marie** the defendant was charged that it did "discharge, or cause to be discharged, or permit to be discharged, or deposit" materials that would impair the quality of water. It was argued that this was duplicitous (or multiplicitous). Dickson J. for the Court noted that while several previous tests for duplicity had been put forward, none was entirely satisfactory. He then stated:

In my opinion, the primary test should be a practical one, based on the only valid justification for the rule against duplicity: does the accused know the case he has to meet, or is he prejudiced in the preparation of his defence by ambiguity in the charge? Viewed in that light, as well as by the other tests mentioned above, I think we must conclude that the charge in the present case was not duplicitous. There is nothing ambiguous or uncertain in the charge. The city knew the case it had to meet. Section 32(1) of the **Ontario Water Resources Act** is concerned with only one matter, pollution. That is the gist of the charge and the evil against which the offence is aimed. One cognate act is the subject of the prohibition.

Only one generic offence was charged, the essence of which was "polluting", and that offence could be committed in one or more of several modes. There is nothing wrong in specifying alternative methods of committing an offence, or in embellishing the periphery, provided only one offence is to be found at the focal point of the charge. Furthermore, although not determinative, it is not irrelevant that the information has been laid in the precise words of the section.

R. v. City of Sault Ste. Marie [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353 at 361 (S.C.C.)

It is clear from this that an information which charges an offence that may be committed in a number of ways is not for that reason necessarily duplicitous.

R. v. City of Sault Ste. Marie, [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353 (S.C.C.)

R. v. Fischer (1987), 31 C.C.C. (3d) 303 (Sask. C.A.)

Where an offence can be committed in one of several ways, a charge framed in the words of the statute will not be duplicitous so long as sufficient detail is given to identify the transaction and the different ways in which the offence can be committed are not "diverse or unrelated".

R. v. Milberg (1987), 35 C.C.C. (3d) 45, 20 O.A.C. 75, leave to appeal to S.C.C. refused *ibid*

### Effect of Finding of Duplicity

A single count that contains more than one offence is not a nullity, but is voidable: while it cannot sustain a conviction, it stands until it is attacked. If a court finds that a challenged information is duplicitous, it must give the Crown the opportunity to amend the information by striking out the words creating the duplicity. It is only when the Crown declines to make any amendment after having been given the opportunity to do so that an information should be quashed.

Edwards v. Jones, [1947] K.B. 659 (Div. Ct.)

R. v. Peacock (1954), 108 C.C.C. 129, 18 C.R. 95 (Ont. H.C.)

R. v. Walker (1955), 113 C.C.C. 120, 22 C.R. 345 (Ont. C.A.)

R. v. Baldassara (1973), 11 C.C.C. (2d) 17 (Ont. H.C.)

R. v. Neville (1980), 31 N.B.R. (2d) 171 (N.B.C.A.), *aff'd* (1981) 62 C.C.C. (2d) 1 (S.C.C.)

Alternatively, Crown may amend the duplicitous count to create two separate counts, and proceed on both the divided counts. The rule against multiple convictions would, of course, apply.

Provincial Offences Act, s. 34(1)

R. v. Bass and Bass, [1970] 3 C.C.C. 422 (Ont. C.A.)

R. v. Cotroni; Papalia v. R. (1979), 7 C.R. (3d) 185, 45 C.C.C. (2d) 1 at 12 (S.C.C.)

The amendment of a duplicitous charge beyond the limitation date does not render it invalid, since the amended count is simply a continuation of the original charge.

R. v. Ross (1949), 94 C.C.C. 150, 8 C.R. 218 (Ont. C.A.)

R. v. Peacock (1954), 108 C.C.C. 129 (Ont. H.C.)

R. v. Standeven (1973), 10 C.C.C. (2d) 433 (Ont. H.C.)



## EXCLUSION OF WITNESSES

### Introduction

An application may be made by either the Crown or the defence for an order excluding prospective witnesses (sometimes called an order for sequestration) from the courtroom during the testimony of other witnesses.

### Purpose

The order prevents witnesses from being able to tailor their testimony in light of the testimony given by other witnesses. The order assists each side to expose and develop inconsistencies in the testimony of the other side's witnesses, and prevents the other side's witnesses from tailoring their evidence in order to assist the case being presented. As well, it enhances the credibility of one's own witnesses, since they can be seen to be testifying independently of one another.

This last point is important and is often overlooked. Very often the Crown may want to request an order excluding witnesses even where no defence witnesses, or only the defendant, will be called. This allows counsel during summation to make the point that the Crown witnesses all testified independently of one another.

### Scope of the Order

The order ordinarily applies to all witnesses that the Crown intends to call or that it may call, as well as any witnesses that may be called for the defence, subject to any exceptions made in the order.

R. v. Dobberthein (1973), 13 C.C.C. (2d) 513 (Alta. S.C.A.D.), aff'd (1974), 18 C.C.C. (2d) 449 (S.C.C.)

The question of which witnesses, if any, to exclude is a question of practice within the discretion of the trial judge.

R. v. Grabowski and Thomas (1983), 8 C.C.C. (3d) 78 (Que. C.A.), aff'd without mention of the point (1985), 22 C.C.C. (3d) 449 (S.C.C.)

However, the discretion must be exercised judicially. Such orders, if requested, are normally given as a matter of course in Ontario and there must be some grounds for the refusal of the order.

Re Learn and R. (1981), 63 C.C.C. (2d) 191 (Ont. H.C.J.)



## Exceptions to the Order

As noted above, the trial judge has a discretion as to which witnesses will be covered by the order. There are several witnesses who are commonly excepted from the order:

- (a) the police officer in charge of the investigation, particularly where the officer is required to assist the Crown;  
 R. v. Grabowski and Thomas (1983), 8 C.C.C. (3d) 78, aff'd without mention of the point (1985), 22 C.C.C. (3d) 449 (S.C.C.)  
 Re O'Callaghan and R. (1982), 65 C.C.C. (2d) 459 (Ont. H.C.J.)
- (b) expert witnesses, particularly where they will be giving opinion evidence based on the factual testimony of other witnesses;  
 Re O'Callaghan and R., (1982), 65 C.C.C. (2d) 459 (Ont. H.C.)
- (c) the defendant, who has a statutory right (subject to certain limited exceptions) to be present in the courtroom at all times.

Provincial Offences Act, s. 52(1)

When the Crown wishes to have the investigating officer excepted from the order, it is useful to tell the judge whether or not the investigating officer was an eyewitness to the offence (the only situation, it is submitted, where it might be proper not to except the officer from the order).

## Effect of Witness Remaining in Courtroom

It is not clear whether a judge has the power to refuse to hear a witness who has been present in the courtroom in breach of an exclusion order, although it would seem that a judge has no such discretion where the witness is a reply witness that the Crown had not originally intended to call and who could not reasonably have anticipated that he would be called as a witness.

R. v. Carefoot (1948), 90 C.C.C. 331 (Ont. H.C.)

R. v. Dobberthein (1973), 13 C.C.C. (2d) 513 (Alta. S.C.A.D.),  
 aff'd (1974), 18 C.C.C. (2d) 449 (S.C.C.)

See W. H. Carleton, Q.C., "Exclusion of Witnesses" [1978] January *Crowns Newsletter*

2

It may be that the refusal by a judge to hear evidence of a defence witness would constitute a violation of the rights of a defendant under ss. 7 or 11(d) of the **Charter**.

Where a witness who was present in the courtroom despite an order for exclusion (whether advertently or inadvertently) subsequently testifies, the trial judge should take the fact that the witness has heard the evidence given by other witnesses into consideration in assessing the weight to be given to the testimony of that witness. In addition, if the disobedience is wilful, that in itself is a consideration in assessing the weight to be given to the testimony of the witness.

R. v. Dobberthein (1973), 13 C.C.C. (2d) 513 (Alta. S.C.A.D.),  
aff'd (1974), 18 C.C.C. (2d) 449 (S.C.C.)

Re O'Callaghan and R. (1982), 65 C.C.C. (2d) 459 (Ont. H.C.)

However, if the witness was present in court because he was excepted from the order (and probably also if he was inadvertently in breach of it) and was considered by the trier of fact to be an honest witness, his credibility will not necessarily be affected to any great extent.

R. v. Grabowski and Thomas (1983), 8 C.C.C. (3d) 78, aff'd without mention  
of the point (1985), 22 C.C.C. (3d) 449 (S.C.C.)

A witness who wilfully disobeys an order for exclusion may be subject to proceedings for contempt of court.

Re O'Callaghan and R. (1982), 65 C.C.C. (2d) 459 (Ont. H.C.)

### **Communication With Excluded Witness**

An order for exclusion should also include a direction that witnesses should not attempt to communicate with other witnesses, particularly if the other witness has testified. It is improper for any person to use any direct or indirect method to convey to prospective witnesses information about testimony given by other witnesses.

Re O'Callaghan and R. (1982), 65 C.C.C. (2d) 459 (Ont. H.C.)

Subject to this restriction, it is not improper for counsel to communicate with a witness who is the subject of an exclusion order. In doing so, counsel are bound to observe the spirit, as well as the letter, of Rule 10, Commentary 15 of the Law Society of Upper Canada's **Rules of Professional Conduct**.

The lawyer should observe the following guidelines respecting communication with witnesses giving evidence:

- (a) During examination in chief: it is not improper for the examining lawyer to discuss with the witness any matter that has not been covered in the examination up to that point.
- (b) During examination in chief by another lawyer of a witness who is unsympathetic to the lawyer's cause: the lawyer not conducting the examination in chief may properly discuss the evidence with the witness.

- (c) Between completion of examination in chief and commencement of cross-examination of the lawyer's own witness: there ought to be no discussion of the evidence given in chief or relating to any matter introduced or touched upon during the examination in chief.
- (d) During cross-examination by an opposing lawyer: while the witness is under cross-examination the lawyer ought not to have any conversation with the witness respecting the witness's evidence or relative to any issue in the proceeding.
- (e) Between completion of cross-examination and commencement of re-examination: the lawyer who is going to re-examine the witness ought not to have any discussion respecting evidence that will be dealt with on re-examination.
- (f) During cross-examination by the lawyer of a witness who is sympathetic to that lawyer's cause: any conversations ought to be restricted in the same way as communications during examination in chief of one's own witness.
- (g) During re-examination of a witness called by an opposing lawyer: if the witness is sympathetic to the lawyer's cause there ought to be no communication relating to the evidence to be given by that witness during re-examination.

If there is any question whether the lawyer's behaviour may be in violation of a rule of conduct or professional etiquette, it will often be appropriate to obtain the consent of the opposing lawyer and leave of the court before engaging in conversations that may be considered improper or a breach of etiquette.

Re O'Callaghan and R. (1982) 65 C.C.C. (2d) 459 (Ont. H.C.), considering and approving an earlier version of Rule 10, Commentary 15 of the **Rules of Professional Conduct** as reproduced here.

R. v. Arsenault (1956), 115 C.C.C. 400 (N.B.C.A.)

## INFORMATION

### Introduction

An information is one of the documents which may be used to commence proceedings under the **Provincial Offences Act**. It is sworn by an informant, whose allegations must legally constitute an offence. Its purposes are to inform the defendant of the particular allegation against him and to give the court jurisdiction to deal with the matter.

The wording of the information should provide the defendant and the court with an informative statement of the charge. However, the explicit intent of the **Provincial Offences Act** is to prevent technical defects from precluding a hearing on the merits of the charge.

The provisions of the **Provincial Offences Act** governing informations are broadly similar to the provisions of the **Criminal Code**. Nevertheless, there are also significant differences. These differences in wording, as well as the explicit philosophy of the **Provincial Offences Act**, must be kept in mind when cases decided under the **Criminal Code** are cited in support of challenges to informations (or certificates of offence) under the **Provincial Offences Act**.

The provisions for amendment and quashing apply to both informations and certificates of offence. Accordingly, the discussion of these matters below applies to both modes of commencement of proceedings.

### Provincial Offences Act

See sections 21, 22, 23, 24, 25, 33, 34, 36, 45, 90, 124.

### Who May Be An Informant

Under the **Provincial Offences Act**, a private citizen wishing to commence a proceeding must use an information. A provincial offences officer may choose to proceed by way of information under Part III rather than by certificate of offence under Part I for any number of reasons, such as the possible imposition of a higher monetary penalty upon conviction.



## Duties of the Justice

A justice is obliged to receive an information if it is properly presented and is valid on its face: that is, if the information sufficiently describes the defendant, alleges an offence known to law that took place within the territorial jurisdiction of the justice, and has been laid within the limitation period. The justice is not required at this stage to ensure that the information complies strictly with the provisions governing sufficiency. Provided the requirements set out above are met, the justice has no discretion to refuse to receive (i.e. swear) the information.

R. v. Whitmore (1987), 41 C.C.C. (3d) 555 (Ont. H.C.), aff'd (1989), 51 C.C.C. (3d) 294 (C.A.)

The next step involves the justice acting in a judicial function and requires the exercise of discretion. The justice must determine whether a case has been made out for compelling the attendance of the defendant in court to answer the charge and, if so, what form of process should issue. The test to be applied is not whether the informant has reasonable and probable grounds for his belief but whether or not a *prima facie* case has been made out: that is, whether there is some evidence against the defendant on all the essential elements of the alleged offence.

R. v. Whitmore (1987), 41 C.C.C. (3d) 555 (Ont. H.C.), aff'd (1989), 51 C.C.C. (3d) 294 (Ont. C.A.)

In making this decision, the justice must consider the information and, where he considers it desirable, hear and consider *ex parte* the allegations of the informant and the evidence of witnesses.

Provincial Offences Act, s. 24(1)

R. v. Whitmore (1987), 41 C.C.C. (3d) 555 (Ont. H.C.), aff'd (1989), 51 C.C.C. (3d) 294 (Ont. C.A.)

A justice must consider the evidence of other witnesses where they are called. It appears that before refusing to issue process, a justice must hear the informant as well as any witnesses the informant wishes to call.

R. v. Whitmore (1987), 41 C.C.C. (3d) 555 (Ont. H.C.), aff'd (1989), 51 C.C.C. (3d) 294 (Ont. C.A.)

A decision by a justice that no case has been made out for issuing process does not affect the validity of the information. The informant is entitled to seek process from another justice.

R. v. Whitmore (1987), 41 C.C.C. (3d) 555 (Ont. H.C.), aff'd (1989) 51 C.C.C. (3d) 294 (Ont. C.A.)

R. v. Allen (1974), 20 C.C.C. (2d) 447 (Ont. C.A.)

The inquiry as to whether process should issue must be held *in camera*. While this requirement infringes s. 2(b) of the **Charter**, it is a reasonable limit on that freedom that is saved by s. 1 of the **Charter**.

Southam Inc. v. Coulter (1990), 60 C.C.C. (3d) 267 (Ont. C.A.)

### Omission of Date in Jurat

The date in the jurat of an information (the portion of the information filled out by the justice containing the date and place that the information was sworn and the justice's signature) fulfills two purposes: it forms part of the oath which is required for an information, and it also allows a person examining an information to determine whether there has been compliance with any applicable limitation period.

Re R. and Village of Bobcaygeon (1974), 17 C.C.C. (2d) 236 (Ont. C.A.)

An information is not automatically a nullity where some portion of the date (whether day, month or year) is missing. If it is possible to determine from the face of the information that it was laid within the limitation period, the defect is merely an irregularity that will not provide grounds for quashing the information.

R. v Dean (1985), 17 C.C.C. (3d) 410 (Alta. Q.B.)

R. v Joiner (unreported, Ont. Dist. Ct., Jan. 18, 1989, per Lesage A.C.J.)

R. v Akey (1990), 1 O.R. (3d) 693 (Gen. Div.)

In determining whether the information has been laid within the limitation period, the court may not apply the presumption of regularity (*omnia praesumitur rite et solemniter esse acta donec probetur in contrarium*), hear extrinsic evidence, or consider other endorsements on the information.

Re R. and Village of Bobcaygeon (1974), 17 C.C.C. (2d) 236 (Ont. C.A.)

R. v Joiner (unreported, Ont. Dist. Ct., Jan. 18, 1989, per Lesage A.C.J.)

However, the court may consider the date of the alleged offence and the date the defect is drawn to its attention and draw commonsense inferences from those dates. For example, if the year is missing from the jurat, but the date of the offence and the date the court considers the matter mean that there is only one year during which the information could have been sworn, and that date falls within the limitation period, the information is not a nullity.

R. v Dean (1985), 17 C.C.C. (3d) 410 (Alta. Q.B.)

R. v Joiner (unreported, Ont. Dist. Ct., Jan 18, 1989, per Lesage A.C.J.)

R. v Akey (1990), 1 O.R. (3d) 693 (Ont. Gen. Div.)



Where the missing date leaves the information ambiguous as to whether it was sworn before or after the alleged date of the offence, the court may apply the presumption of regularity to conclude that the information was sworn after the date of the offence.

R. v Long (unreported, Ont. Gen. Div., Nov. 16, 1990, per German J.)

### **Illegible Signature in Jurat**

An illegible signature in a jurat on an information does not render the information a nullity, at least where the signature appears above the words "A Justice of the Peace in and for the Province of Ontario". (It may be preferable, however, that an illegible signature be accompanied by a printed version of the name of the Justice of the Peace.) In any event, any irregularity in the signature is cured by the presumption of regularity (*omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*).

R. v. Kapoor (1989), 52 C.C.C. (3d) 41, 19 M.V.R. (2d) 219 (Ont. H.C.)

### **Use of Stamp to Affix Signature**

A justice of the peace may not use a stamp to sign the jurat. An information so signed is a nullity.

R. v. Welsford, [1969] 4 C.C.C. 1, 6 C.R.N.S. 90 (S.C.C.)

However, the use of a rubber stamp by an informant completing an information, while a practice to be discouraged, does not render an information a nullity.

R. v. Burton, [1970] 3 C.C.C. 381 (Ont. H.C.), leave to appeal to Ont. C.A. refused *ibid*

### **Failure to Complete Summons Return**

The failure to complete the portion of the information for recording the date for which a summons has been made returnable does not render the information a nullity.

R. v. Moghal (unreported, Ont. Prov. Ct., Judicial District of York, Feb. 6, 1986, per Lampkin J).

### **Defects Within Informations**

The powers of amendment in the **Provincial Offences Act** are extremely wide both as to what amendments may be made and as to when they may be made. The basis for the court's power to amend is set out in s. 34 of the **Provincial Offences Act**, and s. 36(2) sets out the important principle that a court must not quash an information or certificate of offence unless an amendment or particulars would fail to satisfy the ends of justice.

Cf. R. v. Moore (1988), 41 C.C.C. (3d) 289 (S.C.C.)

The effects of various defects in an information are discussed under specific headings below.

### **Name of Defendant**

An information cannot be laid against an unknown person. It must name the defendant, or at least describe the defendant sufficiently as to make him or her identifiable (although it appears that this does not necessarily have to be done by name). An information that fails to do this will be a nullity and must be quashed.

Re Buchbinder and R. (1985), 20 C.C.C. (3d) 481, 47 C.R. (3d) 135 (Ont. C.A.)

However, the mere misspelling of a defendant's name does not render an information a nullity, but is merely a defect in substance or form, so long as it is clear to whom the charge refers. Such a defect should be amended unless the amendment would result in an injustice being done.

Re R. and J.F. Brennan and Associates Limited (1981), 61 C.C.C. (2d) 1 (Ont. H.C.)

J. Douglas Ewart, "Appellation Non Contrôlée: The Misspelling of the Defendant's Name on Informations or Certificates of Offence" (1982), 23 Crim. L.Q. 492

A failure to amend an information from "J.F. Brennan and Associates" to "J.F. Brennan and Associates Limited" was an error, as was a failure to amend "McGilvary" to "McGilvray".

Re R. and J.F. Brennan and Associates Limited (1981), 61 C.C.C. (2d) 1 (Ont. H.C.)

R. v. McGilvray, (unreported), Ont. H.C., May 1, 1981, per Gray J.

See also the cases discussed in Ewart, *supra*

### **Time of Offence**

A complete failure to indicate the date of the offence renders the information a nullity, since it cannot be determined from the face of the information whether it was laid within the limitation period.

Re R. and Village of Bobcaygeon (1974), 17 C.C.C. (2d) 326 (Ont. C.A.)

However, it is not necessary that an information specify the exact date or time of the offence, since time is not generally an essential element of the offence. What constitutes reasonable or adequate specificity will vary depending on the factual and legal nature of the offence charged, since an information is required to provide the defendant with sufficient information to permit him to identify the transaction and prepare a defence.

R. v. B.(G.), [1990] 2 S.C.R. 30, 56 C.C.C. (3d) 200 (S.C.C.)

Brodie v. R., [1936] S.C.R. 186, 65 C.C.C. 289 (S.C.C.)

An information that charged a defendant with impaired driving "on or about" a specific date, without giving a time, has been held to be sufficient.

R. v. Ryan (1985), 23 C.C.C. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused [1986]

1 S.C.R. xiii

If the time specified in the information or certificate is inconsistent with the evidence given at trial and time is not an essential element of the offence or crucial to the defence, the variance is not material. The information need not be quashed.

Provincial Offences Act, s. 34(3)(a)

R. v. B.(G.), [1990] 2 S.C.R. 30, 56 C.C.C. (3d) 200 (S.C.C.)

It appears that the preferable course where such a variance arises is to amend the information to conform with the evidence.

Morozuk v. R., [1986] 1 S.C.R. 31, 24 C.C.C. (3d) 257

## Place of Offence

Provided that the defendant has been given sufficient information to be able to identify the transaction, the information is not required to specify the exact location of the offence.

R. v. Ryan (1985), 23 C.C.C. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused [1986] 1 S.C.R. xiii

Re R. and R.I.C. (1986), 32 C.C.C. (3d) 399 (Ont. C.A.)

It would appear that all information, including any disclosure, given to the defendant must be considered in determining whether the defendant has been given adequate information with respect to the place of the offence. In particular, the fact that the defendant was apprehended or charged at or immediately after the time of the alleged offence is a relevant consideration in determining whether the defendant was given adequate notice of the place of the offence.

R. v. Ryan (1985), 19 C.C.C. (3d) 231 (Ont. H.C.), aff'd (1985), 23 C.C.C. (3d) 1 (C.A.), leave to appeal to S.C.C. refused [1986] 1 S.C.R. xiii

Re R. and R.I.C. (1986), 32 C.C.C. (3d) 399 (Ont. C.A.)

On a charge of impaired driving, an information charging that the offence took place within Metropolitan Toronto, without giving a street address, has been held to be sufficient.

R. v. Ryan, *supra*

### Single Transaction

The "single transaction" requirement of s. 25(2) refers to the facts alleged to constitute an offence. The requirement that a count in an information not allege more than one offence at law is referred to as the "non-duplicity" requirement.

See "Duplicity", *supra*

While each count should relate to a single transaction, a "transaction" may be made up of several related incidents. These incidents may occur over a period of time.

R. v. Flynn (1955), 111 C.C.C. 129 (Ont. C.A.)

R. v. Cotroni; Papalia v. R. (1979), 45 C.C.C. (2d) 1 (S.C.C.)

Re R. and R.I.C. (1986), 32 C.C.C. (3d) 399 (Ont. C.A.)

R. v. Hulan, [1970] 1 C.C.C. 36 (Ont. C.A.)

The single transaction rule applies only to the wording of the charge, not to the evidence which may be led at the trial of that charge. Some offences by their very nature are continuing offences that permit several illegal incidents to be described in a single count as a single transaction.

R. v. Labine (1976), 23 C.C.C. (2d) 567 (Ont. C.A.)

The events may be related in time, place, method, or victim. For example, when five people successively raped one victim on the same bed, the single count covered the whole course of their conduct and was in effect one transaction.

R. v. Zamal et al., [1964] 1 C.C.C. 12 (Ont. C.A.)

A single act may be considered as one transaction even though it results in simultaneous consequences to several different victims.

R. v. Porter (1977), 33 C.C.C. (2d) 215 (Ont. C.A.)



However, when the unlawful incidents occur at different times and places, to different victims by means of different modes of conduct, they ought to be pleaded as separate counts.

R. v. Rafael (1972), 7 C.C.C. (2d) 325 (Ont. C.A.)

R. v. Deutsch (1983), 5 C.C.C. (3d) 41 (Ont. C.A.), aff'd on other grounds (1985), 27 C.C.C. (3d) 385 (S.C.C.)

Where a single count covers several incidents which constitute a course of conduct and the evidence only proves some of the incidents were unlawful, the charge remains valid.

R. v. Barnes (1975), 26 C.C.C. (2d) 112 (N.S.C.A.)

### **Factual Sufficiency**

A count in an information must contain sufficient detail of the circumstances of the alleged offence to:

- (i) give the defendant reasonable information with respect to the act or omission to be proved against him; and
- (ii) identify the transaction referred to.

The Supreme Court of Canada has elaborated somewhat on these requirements in the so-called "golden rule":

...the golden rule is for the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial. When, as in the present case, the information recites all the facts and relates them to a definite offence identified by the relevant section of the Code, it is impossible for the accused to be misled.

R. v. Côté (1978), 33 C.C.C. (2d) 353, 40 C.R.N.S. 308 at 313 (S.C.C.)

R. v. B.(G.), [1990] 2 S.C.R. 30, 56 C.C.C. (3d) 200 (S.C.C.)

It appears that a charge in the words of the offence that does not give some factual context to the offence will not necessarily be sufficient.

R. v. WIS Developments Corp. Ltd., [1984] 1 S.C.R. 485, 12 C.C.C. (3d) 129

What constitutes reasonable or adequate information with respect to the act or omission to be proven against the defendant will vary depending upon the factual and legal character of the offence charged.

R. v. B.(G.), [1990] 2 S.C.R. 30, 56 C.C.C. (3d) 212 (S.C.C.)

It would appear that material other than the wording of the information that has been given to the defendant must be considered in determining whether this test has been met. In particular, the fact that the defendant was apprehended or charged at or immediately after the time of the alleged offence is a relevant consideration in determining whether the defendant has been given adequate notice of the transaction. As well, it seems that any disclosure given to the defendant must be considered.

R. v. Ryan (1985), 19 C.C.C. (3d) 231 (Ont. H.C.) aff'd (1985), 23 C.C.C. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused [1986] 1 S.C.R. xiii

Re R. and R.I.C. (1986), 32 C.C.C. (3d) 399 (Ont. C.A.)

### Statement of Offence

The statement of the offence, which refers to the legal basis of the charge against the defendant, may be:

- (i) in popular language without technical averments or allegations of matters that are not essential to be proved;
- (ii) in the words of the enactment which describes the offence;  
or
- (iii) in words that are sufficient to give the defendant notice of the offence with which he is charged.

In addition, s. 25(3) of the **Provincial Offences Act** provides that where an offence is identified but a court fails to set out one or more of the essential elements of the offence, a reference to the provision creating or defining the offence shall be deemed to incorporate all the essential elements of the offence. This power is significantly broader than that found in the corresponding section of the **Criminal Code**.

G.J. Fitch "Sufficiency of Information and Curative Powers under s. 26(3) of Ontario's Provincial Offences Act: A Brief Annotation" (1989) 1 J.M.V.L. 109

A charge of "driving while under suspension...contrary to s. 35(1) of the **Highway Traffic Act**" is not a nullity despite the fact that it omits references to "motor vehicle" and "driver's licence", since by virtue of s. 25(3) these are deemed to be incorporated.

R. v. Shier, (unreported, Ont. H.C., Nov. 17, 1989, per Hughes J.)

R. v. Dupuis, (unreported, Ont. H.C., Feb. 2, 1980, per Rutherford J.)



It appears that s. 25(3) can also cure an information that states defectively an element of the offence, rather than omitting an element. An information that used the words "operates a motor vehicle" rather than "drives a motor vehicle" has been held to incorporate the element of "driving" by virtue of the section number of the offence and the application of s. 25(3).

R. v. West (1981), 13 M.V.R. 70 (Ont. H.C.)

### **Mode of Participation**

An information is not required to specify whether a defendant is charged as a principal in the first degree or as a party to the offence under s. 77.

Thatcher v. R., [1987] 1 S.C.R. 652, 32 C.C.C. (3d) 481 (S.C.C.)

R. v. Elijah (1989), 53 C.C.C. (3d) 36 (Ont. Dist. Ct.)

### **Specification of Statute**

The use of the initials "H.T.A." rather than "Highway Traffic Act" are sufficient to designate that statute, and an information or certificate of offence that is otherwise sufficient will not for that reason alone be a nullity.

R. v. Lemieux (1982), 68 C.C.C. (2d) 189, 15 M.V.R. 126 (Ont. C.A.)

### **Incorrect Section Number**

An information that alleges all the essential elements of an offence but sets out an incorrect section number is not a nullity, and may be amended prior to plea.

R. v. Royka (1980), 52 C.C.C. (2d) 368 (Ont. C.A.)

R. v. Mansfield (1982), 50 N.S.R. (2d) 706 (N.S.C.A.)

Cf. Day. v. R. (1985), 36 M.V.R. 221 (Ont. Dist. Ct.)

### **Amendment of Information**

The court has no jurisdiction to amend an information that is a nullity. However, not every defective charge will be a nullity. A charge will only be a nullity if it is so badly drawn as to fail completely to give the defendant notice of the offence with which he is charged.

R. v. Moore (1988), 41 C.C.C. (3d) 289 (S.C.C.)

As a practical matter, it is difficult to see how an information that refers to the section number creating the offence could ever be this defective in light of s. 25(3).

Absent absolute nullity, the court has very wide power to cure any defect in a charge by amending it. If the mischief to be cured by amendment has misled or prejudiced the defendant in his defence, the judge must then determine whether the misleading or prejudice can be removed by an adjournment. If so, he must amend, adjourn, and thereafter proceed. However, if the required amendment cannot be made without injustice being done, *then and only then* may the court quash the information or certificate.

Provincial Offences Act, s. 36(2)

R. v. Moore (1988), 41 C.C.C. (3d) 289 (S.C.C.)

### Time of Amendment

The former summary conviction provisions of the **Criminal Code** were held not to permit the amendment of an information prior to plea. The wording of the **Provincial Offences Act** is significantly different and clearly permits amendment or particulars prior to plea.

R. v. Cie Chimique Clough (1987), 1 M.V.R. (2d) 1 (Ont. H.C.)--note that this is an oral judgment and the reference at p. 3 of this report that "the *Dangerous Goods Transportation Act*, S.O. 1981, c. 69" should clearly be a reference to the Provincial Offences Act.

Cf. R. v. WIS Developments Corp., [1984] 1 S.C.R. 485, 12 C.C.C. (3d) 129

The broad wording "at any stage of the proceeding" in s. 34(1) of the **Provincial Offences Act** permits amendments falling within the scope of that section to be made after conviction but prior to sentence.

R. v. Paul Magder Furs Ltd. (1989), 69 O.R. (2d) 172 (C.A.)



## JOINDER OF COUNTS

### Introduction

The **Provincial Offences Act** provides that any number of counts for any number of offences may be joined in the same information, and that separate counts, informations or certificates may be joined before trial where the court is satisfied that the ends of justice so require.

### Provincial Offences Act

See sections 25(5), 38(1).

### Tests for Joinder

The phrase "ends of justice" encompasses both the interests of the accused and the interests of the administration of justice.

R. v. Racco (No. 1) (1975), 23 C.C.C. (2d) 201 (Ont. Co. Ct.)

In determining whether counts should be tried jointly, the court should consider whether there is an adequate nexus in time, place, and type of offence and whether prejudice to the defendant will result. It should also consider the interests of the administration of justice, including the cost to the taxpayer (and presumably the extra burden placed on the judicial system by separate trials).

R. v. Freedman (1978), 2 C.R. (3d) 345 (Ont. Co. Ct.)

### Joinder of Criminal Code and Provincial Offences

It has been suggested that a provincial offence and a **Criminal Code** offence can be included in the same information and tried together. There is judicial support for this view.

Drinkwater and Ewart **Ontario Provincial Offences Procedure** (Toronto: Carswell, 1980) at 101

R. v. Massick (1985), 21 C.C.C. (3d) 128, 47 C.R. (3d) 148 (B.C.C.A.)

However, it is submitted that an information joining a **Criminal Code** offence and a provincial offence, even if technically permissible, is unwise. The two charges are governed by different rules of procedure and evidence: for example, the **Criminal Code** charge is governed by the **Canada Evidence Act**, while the provincial offence is governed by the **Ontario Evidence Act**. Because of this, it is difficult to see how "the ends of justice" could require, or perhaps even permit, a joint trial.

The power to join multiple counts in an information does not violate s. 7 of the **Charter**, since the trial judge has the power to sever when necessary to give effect to the principles of fundamental justice.

R. v. Wolynech (1989), 35 O.A.C. 236 (Ont. C.A.)

### **Further References**

See also "Severance of Counts", *infra*

## JOINDER OF DEFENDANTS

### Introduction

The **Provincial Offences Act** permits defendants charged in separate informations or certificates to be tried together. There is no analogous provision in the **Criminal Code**.

Although it is a practice to be avoided, as an investigation proceed the police may charge one person whose admissions may lead to further persons being charged. In the past, defendants charged separately had to be tried separately, with extra expense, inconvenience to witnesses and the possibility of apparently inconsistent rulings and decisions.

### Provincial Offences Act

See subsection 38(1)

### The General Principle

As a general rule, persons acting in concert or engaged in a common enterprise should be jointly tried. It is a matter for the court's discretion whether there should be a joint trial, and that discretion will not be disturbed unless its exercise has led to a miscarriage of justice.

R. v. Grondkowski & Malinowski (1946), 31 Cr. App. R. 116 (C.A.)

R. v. Agawa & Mallet (1975), 28 C.C.C. (2d) 379, 31 C.R.N.S. 293 (Ont. C.A.)

R. v. McNamara (No. 1) (1981), 56 C.C.C. (2d) 193 (Ont. C.A.), aff'd on other grounds [1985] 1 S.C.R. 662, 19 C.C.C. (3d) 1 (S.C.C.)

### Tests for Joinder

The phrase "ends of justice" encompasses both the interests of the defendant and the interests of the administration of justice.

R. v. Racco (No. 1) (1975), 23 C.C.C. (2d) 201 (Ont. Co. Ct.)

The section appears to place the onus of establishing that joinder would be appropriate on the person seeking joinder.

### Further References

See "Severance of Defendants", *infra*





## JURISDICTION OVER OFFENCE

### Introduction

The concept of jurisdiction over an offence broadly describes the power of a court to deal with, and try, a matter coming before it. This broad concept includes several distinct aspects, including the territorial jurisdiction of the court, the territorial jurisdiction of the person presiding in the court, the existence and presence of an information, and the concept of "seizure of jurisdiction".

### Provincial Offences Act

See ss. 29, 31.

### Courts of Justice Act

See ss. 33, 37, 38, 61.

### Territorial Jurisdiction

Historically, although an offence was considered to be a breach of the sovereign's peace and therefore of interest to the whole of society, it was felt that the interests of the local citizenry required that crimes be tried locally. This allowed the local residents to see first hand the administration of justice. It also served as a convenience to jurors, witnesses and the defendant. From this reasoning came the common law principle that a proceeding should be tried in the county or district in which the offence was committed. The **Provincial Offences Act** has continued this, subject to two exceptions.

Provincial Offences Act s. 29(1)

An offence may be heard in another Ontario Court (Provincial Division) which is not within the territorial jurisdiction where the offence was committed if that court is reasonably proximate to the location of the offence and if the offence notice or summons directs an appearance be made in that court. In addition, with the consent of the parties or if the interests of justice require it, a matter can be transferred to any other location in Ontario.

Provincial Offences Act, s. 29

## Change of Venue

In addition to a consensual change of location for the trial, a court may, upon application, order a proceeding transferred to another location in Ontario if "it would be appropriate in the interests of justice".

In deciding whether a change of venue should be ordered, the court must exercise its discretion judicially and in a principled manner.

R. v. Charest (1990), 57 C.C.C. (3d) 312 (Que. C.A.)

R. v. Kelly (1973), 15 C.C.C. (2d) 488 (Ont. H.C.)

The fundamental consideration is whether a change of venue is necessary in order to ensure that a defendant has a fair trial with an impartial trier of fact.

R. v. Collins (1989), 48 C.C.C. (3d) 343, 69 C.R. (3d) 235 (Ont. C.A.)

R. v. Charest (1990), 57 C.C.C. (3d) 512 (Que. C.A.)

The onus lies on the applicant to satisfy the court that a fair and impartial trial cannot be had in the location where the matter would otherwise be tried.

R. v. Fitzgerald and Schoenberger (1981), 61 C.C.C. (2d) 504 (Ont. H.C.J.)

R. v. Adams (1946), 86 C.C.C. 425 (Ont. H.C.)

Though the power to order a proceeding moved is discretionary, it should be used with great caution and there must be clear and plain reasons for it.

R. v. DeBrugge (1927), 47 C.C.C. 31 (Ont. H.C.)

R. v. Adams (1946), 86 C.C.C. 425 (Ont. H.C.)

R. v. Turvey (1970), 12 C.R.N.S. 329 (N.S.S.C.)

R. v. Bryant (1980), 54 C.C.C. (2d) 54 (Ont. H.C.)

The strongest argument to resist a change of venue motion is that **Provincial Offences Act** matters are tried by a judge or justice, not a jury. Both judges and justices are trained and experienced at disregarding extraneous considerations and deciding matters solely on the admissible evidence adduced at trial. As a result, applications for a change of venue under the **Provincial Offences Act** are as a matter of practice extremely rare, and would only be appropriate in very exceptional circumstances.

## Offence in Several Jurisdictions

Where a single offence occurs in more than one territorial jurisdiction (for example, a "police pursuit" charge under s. 216 of the **Highway Traffic Act** that continues through several counties) the court in any jurisdiction in which some part of the offence occurred has jurisdiction to try the matter. The test is whether any element of the offence has occurred in the area claiming jurisdiction.

R. v. Bigelow (1982), 69 C.C.C. (2d) 204 (Ont. C.A.)

Bell v. R. (1983), 8 C.C.C. (3d) 97, 36 C.R. (3d) 289 (S.C.C.)

## Jurisdiction of the Justice

A justice of the peace is usually commissioned to act in any county or district within Ontario. The justice's territorial jurisdiction is therefore broader than that of a particular court of the Ontario Court (Provincial Division).

Justices of the Peace Act, R.S.O. 1980, c. 227, s. 2

As a result, a justice of the peace may receive an information and issue process in any county, so long as the process is made returnable in the area of the appropriate Ontario Court (Provincial Division).

R. v. Tally (1915), 23 C.C.C. 449 (Alta. S.C.)

## Information Not Before Court

It seems that a court has jurisdiction to hold a trial or to adjourn a matter without the information being physically before the court (although there must be an information in existence).

R. v. Baert (1981), 28 A.R. 313 (C.A.), leave to appeal to S.C.C. refused 37 N.R. 309n

Re Perrault and R. (1982), 65 C.C.C. (2d) 279 (Sask. C.A.)

## Seizure of Jurisdiction

Seizure of jurisdiction refers to the principle that a particular judge or justice may by his or her involvement with a proceeding become exclusively "seized" of it, so that he or she must see the matter through to its conclusion and no other judge or justice can do so. Over time, the notion of seizure has been greatly restricted. At one point, a justice who received an information became exclusively seized with the matter; later, a justice who took a plea became seized. The **Provincial Offences Act** now provides that a justice becomes seized only when evidence is first taken at the trial. Provision is also made in the **Provincial Offences Act** for situations where a judge or justice dies or is for some other reason unable to carry a matter through to its conclusion.

Provincial Offences Act, s. 30(1)

The words "at the trial" may mean that a justice ruling on a pre-trial motion does not become seized of the matter, even if evidence is called on the motion.

## JURISDICTION OVER OFFENDER

### Introduction

A defendant may be brought before the court by means of a summons, an offence notice, a notice of trial, an undertaking, a recognizance, a warrant, a judge's order, or a voluntary appearance.

Once the defendant is before a proper court possessing a valid charge document, that court must retain its authority over the defendant until the matter is concluded. Once jurisdiction over the person is lost, it can only be regained by fresh process or the voluntary reattendance of the defendant.

### Provincial Offences Act

See sections 30, 31, 49 and 54

### Upon Adjournments

If a justice decides to grant an adjournment for a defendant in custody, the matter cannot be put over for more than eight days unless the defendant consents.

This eight day rule applies until the end of the matter, including the imposition of the sentence.

If an adjournment is ordered over the objections of the defendant, he may then consent to an adjournment beyond eight days.

Jouts v. R. (1980), 17 C.R. (3d) 289 (Ont. C.A.)

If the matter is adjourned without consent beyond eight days, section 31 of the **Provincial Offences Act** retains the court's jurisdiction over the offence; however, new process may be required if the defendant does not show up on the adjourned date, since jurisdiction over the person will be lost.

R. v. Stedelbauer (1975), 19 C.C.C. (2d) 359 (Alta. C.A.)

### Trial *Ex Parte*

When service and notification are proved by the prosecutor, a **Provincial Offences Act** matter can be heard in the absence of the defendant. This power, if exercised after the prerequisite proof is tendered, constitutes a statutory jurisdiction over the offender.

R. v. Okanee (1981), 59 C.C.C. (2d) 149 (Sask. C.A.)



Where the Crown wishes to take advantage of the procedure in s. 54 to proceed *ex parte* (whether to proceed to trial or to adjourn the matter) the onus lies on it to establish that a summons was served, a notice of trial or undertaking was given, or a recognizance was entered into. This proof must appear on the record.

R. v. Spiers (unreported, Ont. Prov. Ct., Judicial District of York Region, Feb. 7, 1985, per Zimmerman P.C.J.)

R. v. Ciani (unreported, Ont. Prov. Ct., Judicial District of York, Dec. 22, 1986, per Paris P.C.J.)

The following procedure should be used where the Crown wishes to proceed *ex parte* under section 54.

1. The matter should be held down until at least 30 minutes after the time that the court was scheduled to commence, or until all other matters have been dealt with.
2. When the matter comes up, the defendant's name should be called three times inside, and three times outside, the courtroom.
3. The time the matter is commenced should be endorsed on the information or certificate.

R. v. Brockman (unreported, Ont. Prov. Ct., Judicial District of York, May 13, 1982)

Where a defendant has been properly notified and fails to appear, the court may adjourn the matter to a later date for trial without issuing process or a warrant to compel the defendant to attend on that date.

R. v. Szoboszloi, [1970] 5 C.C.C. 366 (Ont. C.A.), leave to appeal to S.C.C. refused *ibid*

The provisions of the **Provincial Offences Act** that permit a court to hold a trial *ex parte* do not violate ss. 7 or 11(d) of the **Charter**. The provisions do not interfere with the right of a defendant to be present at the trial, but merely provide a machinery to be followed where the defendant chooses not to exercise that right.

R. v. Felipa (1986), 27 C.C.C. (3d) 26, 40 M.V.R. 316 (Ont. C.A.)

A court should not proceed *ex parte* if there is known to be a valid reason for the failure of the defendant to appear, such as a message to the court of adverse weather conditions.

McLeod v. R. (1984), 36 C.R. (3d) 378 (N.W.T.S.C.)

**Power to Require Continuing Attendance**

Once a defendant has appeared before a court and trial has commenced, the court has jurisdiction to require a defendant to remain in the courtroom and may enforce this, if necessary, by directing peace officers present to restrain the defendant from leaving. This authority exists no matter how the court originally gained jurisdiction over the defendant.

Kramer v. Forgrave (1989), 68 O.R. (2d) 414 (Ont. H.C.)

**Further References**

For a further discussion touching on some related matters, see "Attendance of Defendant", *supra*.



## LIMITATION PERIOD

### Introduction

A limitation period marks the time beyond which proceedings for an offence cannot be commenced.

### Provincial Offences Act

See ss. 3(1),(2),(4) and O. Reg. 200, s.11

### When Proceedings Commenced

A proceeding under Part III of the **Provincial Offences Act** is commenced by laying an information before a justice. A summons may be issued after the expiration of the limitation period provided that the information was laid prior to the expiration of the limitation period.

R. ex rel. Southwick v. Gilbert Steel Ltd., [1968] 1 C.C.C. 356, 2 C.R.N.S. 46 (Ont. C.A.)

Parsons v. Procyshen (1962), 39 C.R. 52 (Sask. Dist. Ct.)

A proceeding under Part I of the **Provincial Offences Act** is commenced by filing the certificate of offence in the office of the court named in the certificate.

Provincial Offences Act, s. 3(1)

### Commencement After Limitation Period

Where a proceeding is not commenced until after the limitation period has expired, the information or certificate is a nullity and the court has no jurisdiction to proceed on it.

Re R. and Village of Bobcaygeon (1974), 17 C.C.C. (2d) 236 (Ont. C.A.)

Keddy v. R. (1961), 130 C.C.C. 226 (N.S.S.C.A.D.)

### **Time Period in Information Partly Outside Limitation Period**

An information charging that an offence occurred during a period of time falling partly inside and partly outside the limitation period is not a nullity. The court has jurisdiction to hear the evidence at trial to determine if an offence was committed during that part of the period alleged that falls within the limitation period.

R. v. Penchard (1936), 65 C.C.C. 113 (N.S.S.C.A.D.)

R. v. Fagan (1953), 107 C.C.C. 259 (Ont. Co.Ct.)

R. v. Machiskinic (1985), 41 Sask. R. 311 (Q.B.)

### **Continuing Offences**

Where an offence is a continuing offence that began outside the limitation period but continued into it, the prosecution is not barred and the defendant may be convicted of the offence (provided all elements of the offence have occurred within the limitation period). The fact that the matter first arose outside the limitation period is immaterial.

R. v. Belgal Holdings Ltd., [1967] 3 C.C.C. 34 (Ont. H.C.)

Ganner v. R. (1981), 10 M.V.R. 205 (Ont. Co.Ct.)

In such circumstances, an information covering only the period falling within the limitation period is valid.

R. v. Belgal Holdings Ltd., [1967] 3 C.C.C. 34 (Ont. H.C.)

Generally, an offence will be a continuing offence where there are continuing acts in violation of a statute, where there is a continuing failure to comply with a statute that imposes a specific duty to act, or where the statute provides that each day that an act, state of affairs or omission continues will be an offence. A single act, not in itself a continuing offence, that creates a state of affairs which breaches a statute is not a continuing offence.

R. v. Rutherford (1990), 75 C.R. (3d) 230, 38 O.A.C. 40 (Ont. C.A.)

### **Amendment of Information After Limitation Period**

An information which is defective in substance or form but which is not a nullity may be amended to cure the defect after the expiration of the limitation period. However, an amendment that would have the effect of curing an information that would otherwise be a nullity or substituting an entirely new charge may not be made, since the effect would be to permit the institution of a proceeding after the limitation period had expired.

R. v. Moos, [1969] 4 C.C.C. 173 (Ont. Mag. Ct.)

R. v. Joy Oil Co., [1959] O.R. 288 (C.A.)

The question of the validity or nullity of a defective information is discussed in "Information", supra.





## MOTION FOR NONSUIT

### Introduction

This motion, advanced by the defence, is variously referred to as "no *prima facie* case", "no evidence", and "directed verdict" in the case of jury trials.

It is properly based upon no evidence whatsoever, direct or indirect, upon one or more of the essential elements of the offence. The motion is made at the conclusion of the case for the Crown. It is a question of law whether the motion should be granted.

Even in a non-jury case, there are tactical advantages to the defence in such a motion. A successful motion for non-suit relieves the defence of the difficult task of deciding whether to call any evidence.

### Tests

On a motion for non-suit, the court has only to consider whether there is evidence upon which a properly instructed jury acting reasonably might have convicted the defendant.

R. v. Paul (1976), 27 C.C.C. (2d) 1, 33 C.R.N.S. 328 (S.C.C.)

The court cannot grant a motion for nonsuit because the evidence is unreliable. Reliability and credibility are not to be considered on the motion.

U.S.A. v. Sheppard (1976), 30 C.C.C. (2d) 424, 34 C.R.N.S. 207 (S.C.C.)

The issue on a motion for non-suit is whether there is evidence on all essential points of a charge which, if believed by a properly charged trier of fact acting reasonably, and unanswered, would warrant a conviction. The court may not consider the credibility of the witness or the quality or weight of the evidence that the witness has given.

Mezzo v R., [1986] 1 S.C.R. 802, 27 C.C.C. (3d) 97 (S.C.C.)

Monteleone v. R., [1987] 2 S.C.R. 154, 35 C.C.C. (3d) 193 (S.C.C.)

While there must be evidence on all essential elements of the charge, there need not be direct evidence on all essential elements. It is sufficient if the evidence on some or all essential points is entirely circumstantial.

Monteleone v. R., [1987] 2 S.C.R. 154, 35 C.C.C. (3d) 193 (S.C.C.)

The court cannot consider the weight of the evidence by taking into account the effects of cross-examination.

R. v. Carpenter (1982), 1 C.C.C. (3d) 149 (Ont. C.A.)

### Circumstantial Evidence

The rule in **Hodge's Case** (that where evidence is circumstantial, it must not only be consistent with guilt but inconsistent with any other conclusion), does not apply on a motion for nonsuit.

R. v. Paul (1976), 27 C.C.C. (2d) 1, 33 C.R.N.S. 328 (S.C.C.)

Mezzo v. R., [1986] 1 S.C.R. 802, 27 C.C.C. (3d) 97 (S.C.C.)

Monteleone v. R., [1987] 2 S.C.R. 154, 35 C.C.C. (3d) 193 (S.C.C.)

### Procedure

The motion should be made after the Crown has closed its case. At that time, the court should apply the test set out above and determine whether the motion should be granted. The court may not reserve a ruling on the motion until such time as the defence has elected whether or not to call any evidence, or until such time as defence evidence has been led.

R. v. Kennedy (1973), 11 C.C.C. (2d) 363, 21 C.R.N.S. 251 (Ont. C.A.)

R. v. Snyder (1974), 16 C.C.C. (2d) 331 (Sask. Q.B.)

R. v. Seamans (1978), 41 C.C.C. (2d) 446 (N.B.C.A.)

R. v. Boissonneault (1986), 29 C.C.C. (3d) 345 (Ont. C.A.)

If the motion is dismissed, the defence must be given an opportunity to call evidence.

R. v. Pestell (1976), 31 C.C.C. (2d) 436 (Ont. H.C.)

If the motion is successful, then the charge is dismissed.

### Motion By Court

It has been held that at least in a civil case, the court should not of its own motion nonsuit the Crown. Rather, it should be left to defence counsel to make the motion.

McKenzie v. Bergin, [1937] O.W.N. 200 (Ont. C.A.)

However, it does not seem to be objectionable for the court to raise the issue in a criminal trial when the defendant is unrepresented by counsel.

R. v. Lagace (1985), 60 N.B.R. (2d) 48 (N.B.Q.B.)

As a matter of practice, a court should not grant a non-suit of its own motion without first raising the issue and allowing the Crown to argue the point.

### Co-Defendant Seeking Nonsuit

When two or more defendants are jointly tried, each may independently apply for a nonsuit. If a particular defendant is unsuccessful and then elects to call no evidence, the court should reserve the question of whether the guilt of that defendant has been proved beyond a reasonable doubt until the other defendants have closed their cases. If any defendant gives or leads evidence, it takes effect against any other defendants that it may implicate.

Vanderbeek and Albright v. R. (1971), 2 C.C.C. (2d) 45 (S.C.C.)

### Included Offences

When the court on a motion for non-suit determines that there is no evidence on some element of the offence charged, but there is some evidence on all of the elements of an included offence, the proper course is to continue the trial on that included offence alone.

R. v. Talbot (No. 3) (1977), 38 C.C.C. (2d) 562 (Ont. H.C.)

### Crown May Reopen Case

If the Crown has failed to lead evidence on an essential element and the defence moves for a nonsuit, the Crown may seek leave to reopen its case and call further evidence on the point.

R. v. Perreault (1941), 78 C.C.C. 236 (Que. S.C.)

R. v. Gregoire (1927), 47 C.C.C. 288 (Ont. C.A.)

R. v. Cachia (1974), 17 C.C.C. (2d) 173 (Ont. H.C.)

This discretion to allow a reopening is not limited to matters which were inadvertently overlooked or which arose "*ex improviso*" or "which no human ingenuity could have foreseen".

Robillard v. R. (1978), 41 C.C.C. (2d) 1, 5 C.R. (3d) 186 (S.C.C.)

See "Reopening" in **Evidence**, *infra*, for a further discussion of the law applicable to reopening by the Crown.

### Defence Calling No Evidence

If the defence elects to call no evidence, the court must then consider all the evidence and any inferences that may properly be drawn therefrom, and determine whether the charge has been proved beyond a reasonable doubt.

Rose v. R. (1959), 123 C.C.C. 175 (S.C.C.)



**OFFENCE NOTICE****Introduction**

The offence notice is one of the ways that a defendant may be served notice of a proceeding commenced by certificate of offence. It may be issued only by a provincial offences officer.

**Provincial Offences Act**

See sections 3, 5, 6, 7, 9, 10, 13, 21, 90 and 149

**Validity**

See "Certificate of Offence" for a discussion of the requirements for completion and service of an offence notice.





## PARKING INFRACTIONS

### Introduction

Part II of the **Provincial Offences Act** creates a special procedure for dealing with parking infractions.

### Provincial Offences Act

See sections 14, 15, 16, 17, 18, 19, 20.

### Sufficiency of Certificate

The rules of practice and procedure of the Ontario Court (Provincial Division) require that evidence of the ownership of the vehicle be affixed or appended to the certificate of parking infraction, and that the certificate of parking infraction be affixed or appended to the filing document approved by the clerk of the court. There is sufficient compliance with the rules where the evidence of ownership is appended or affixed to the filing document, which is then appended or affixed to the certificate of parking infraction.

*Metropolitan Toronto v. Beck* (1990), 23 M.V.R. (2d) 61 (Ont. H.C.)

R.R.O. 1980, Reg. 809, as. am. O. Reg. 519/87, s. 1



## PARTICULARS

### Introduction

Where a charge does not provide the defendant with sufficient information to adequately prepare to meet the charge, the defendant may make a motion for particulars of the offence to be supplied to him by the Crown. An otherwise count may be too vague or uncertain to provide the defendant with sufficient information.

### Provincial Offences Act

See sections 35, 36 and 37.

### Purpose of Particulars

Particulars have two purposes: to give the defendant such exact and reasonable information respecting the charge against him that he can fairly defend himself; and to facilitate the administration of justice by clarifying the issues at trial.

R. v. Canadian General Electric Co. Ltd. (No. 1) (1974), 17 C.C.C. (2d) 433 (Ont. H.C.)

R. v. Morin (1985), 23 C.C.C. (3d) 550 (Ont. H.C.)

R. v. Elijah (1989), 53 C.C.C.(30) 36 (Ont. Dist. Ct.)

The purpose of particulars is to allow a defendant to identify what he is alleged to have done wrong so that he may prepare his case adequately, and to permit him to invoke the pleas of autrefois acquit or autrefois convict or the rule against multiple convictions should he be charged with further offences arising out of the same matter.

R. v. WIS Developments Corporation Ltd., [1984] 1 S.C.R. 485, 12 C.C.C. (3d) 129 (S.C.C.)

Particulars should not be ordered where the purpose of the request is to fetter the Crown's case or to limit the possible legal bases of liability that the Crown seeks to rely on (as opposed to the acts which the Crown seeks to use to establish its case).

R. v. Govedarov, Popovic and Askov (1974), 16 C.C.C. (2d) 238 (Ont. C.A.), aff'd (1976), 25 C.C.C. (2d) 161 (S.C.C.)

Thatcher v. R. (1985), 42 C.R. (3d) 259 (Sask. Q.B.)

In determining whether particulars should be ordered, the court may consider information (including any disclosure) supplied to the defence by the Crown.

R. v. Munro (unreported, Ont. Prov. Div., Jan. 25, 1991, per Nadelle P.C.J.)

### Parties to an Offence

A demand for particulars cannot be used to restrict the Crown as to whether the defendant is alleged to be the perpetrator of an offence or a party to it under s. 77 of the **Provincial Offences Act**.

Thatcher v. R., [1987] 1 S.C.R. 652, 32 C.C.C. (3d) 481

Re R. and Elijah (1989), 53 C.C.C.(3d) 36 (Ont. Dist. Ct.)

### Discretionary Order

It is a matter for the court's discretion whether particulars should be ordered in a given proceeding.

Rex v. Griffin (1955), 63 C.C.C. 286 (N.B.C.A.)

### When Particulars Can Be Ordered

Under the **Provincial Offences Act**, particulars can be ordered either before or during the trial.

Provincial Offences Act, s. 35

Under the **Criminal Code**, prior to 1978 particulars could not be ordered until the time for entry of a plea before the judge who would be hearing the trial.

R. v. Haney et al. (1924), 43 C.C.C. 297 (Ont. S.C.)

R. v. Chew, [1968] 2 C.C.C. 127 (Ont. C.A.)

More recently, it has been held that any judge of the court in which an indictment has been filed has the authority to order particulars.

R. v. Pope et al. (1979), 45 C.C.C. (2d) 348 (B.C. Co. Ct.)

Re Cole and R. (1983), 70 C.C.C. (2d) 460 (Ont. H.C.)

R. v. Morin (1985), 23 C.C.C. (3d) 550 (Ont. H.C.)

Accordingly, it would seem that any court, and not just the trial court, could order particulars under s. 35 of the **Provincial Offences Act**.

### **Crown Unable to Supply Details**

When Crown counsel does not have the specific information sought by a defendant, particulars will not be ordered nor will a pretrial examination of Crown witnesses be held to determine if they might possess the information.

Re Cole and R. (1983), 70 C.C.C. (2d) 460 (Ont. H.C.J.)

R. v. Borden (1981), 61 C.C.C. (2d) 122 (Ont. H.C.J.)

R. v. Rooke and DeVries (1990), 56 C.C.C. (3d) 220, 77 C.R. (3d) 397 (S.C.C.)

### **Statement of Crown Not Particulars**

It is clear that the Crown may, in the proper circumstances, provide particulars orally (for instance, during argument on a motion to quash the information or for particulars).

R. v. Cox and Paton, [1963] S.C.R. 500, [1963] 2 C.C.C. 148 (S.C.C.)

However, an oral statement by the Crown as to the theory of its case and the legal grounds upon which it relies does not constitute particulars. This is the case whether the oral statement is made to the defence counsel in court or in the Crown's opening before a jury.

R. v. Govedarov, Popovic and Askov (1974), 16 C.C.C. (2d) 238 (Ont. C.A.),  
aff'd (1976), 25 C.C.C. (2d) 161 (S.C.C.)

R. v. Bengert (No. 5) (1980), 53 C.C.C. (2d) 481 (B.C.C.A.) leave to appeal to S.C.C. refused *ibid*

R. v. Khan (1982), 66 C.C.C. (2d) 32 (Ont. C.A.)

### **Demand for Evidence**

The purpose of particulars is not to provide the defence with the evidence the Crown relies on to establish the offence, as opposed to information about the transaction relied on. The court cannot order disclosure under the guise of ordering particulars.

Ault v. Read (1956), 115 C.C.C. 132 (Alta. C.A.)

R. v. Morin (1985), 23 C.C.C. (3d) 550 (Ont. H.C.)

### **Effect of Particulars**

The general rule is that the prosecutor is bound by the particulars furnished whether it be by order of a court or voluntarily. This, however, is subject to the rule discussed above that particulars may not be ordered to fetter the prosecution.



Particulars which only provide further information for a valid charge are mere surplusage if they delineate descriptive details. It is not necessary to prove nonessential details.

R. v. Van Hees (1958), 27 C.R. 14 (Ont. C.A.)

See "Surplusage", below

However, the failure to prove a particular which is not an element of the offence may result in the charge being dismissed where the failure to prove that particular results in prejudice to the defendant.

R. v. Rooke and DeVries (1990), 56 C.C.C. (3d) 220 (S.C.C.)

Cf. Vezina v. R. (1986), 23 C.C.C. (3d) 481 (S.C.C.)

See also "Surplusage", below

### **Certificate of Offence**

Section 13(2) of the **Provincial Offences Act** provides that use of the short-form wording prescribed by regulation is "sufficient for all purposes to describe the offence". It is submitted that this section does not remove the power to order particulars of an offence charged in a certificate of offence, and s. 13(2) must be read as being subject to ss. 35, 36 and 37.

## PLEAS

### Introduction

The entry of a plea is a crucial stage in a proceeding under the **Provincial Offences Act**, since it determines the future course of the proceeding. A plea of guilty is particularly significant for a defendant, since it functions both as an admission of the offence and as a waiver of the full procedural and constitutional protections provided by a trial.

### Provincial Offences Act

See sections 5, 7, 8, 10, 45 and 46.

### Pleas Available

A defendant is entitled to plead guilty or not guilty. The latter plea encompasses the special pleas of *res judicata*, double jeopardy, *autrefois acquit*, *autrefois convict*, and multiple convictions, which should be separately raised and considered after a plea of not guilty.

*R. v. Riddle*, [1980] 1 S.C.R. 380, 48 C.C.C. (2d) 365 (S.C.C.)

### Refusal to Plead

Where a defendant refuses to plead or does not answer directly when asked to plead, the court should enter a plea of not guilty and proceed to trial.

Provincial Offences Act, s. 45

### Effect of Guilty Plea

A plea of guilty to a criminal charge is an admission by the defendant to all the essential elements of the offence, and dispenses with the necessity of proof of those elements.

*R. v. Lucas* (1983), 9 C.C.C. (3d) 71 (Ont. C.A.), leave to appeal to S.C.C. refused Feb. 2, 1984

## Factual Foundation of Guilty Plea

The court may enter a conviction upon a plea alone. However, it is preferable that evidence, or a summary of the evidence, be put before the court to enable it to better assess culpability and sentence.

R. v. Underhill (1955), 114 C.C.C. 320 (N.B.C.A.)

Adgey v. R. (1973), 13 C.C.C. (2d) 177, 23 C.R.N.S. 298 (S.C.C.)

A defendant upon a plea of guilty should be given an opportunity to accept, reject or explain the evidence of the circumstances or the previous record as adduced by the Crown.

R. v. Doiron (1958), 124 C.C.C. 156 (N.B.C.A.)

A plea of guilty carries with it an admission of the essential legal elements of the offence, and no more. Any facts the Crown wishes to rely on for sentencing purposes must be established by the Crown. If the facts are undisputed, the procedure used to do this can be informal. If the facts are contested, the Crown must prove any aggravating facts beyond a reasonable doubt.

R. v. Gardiner (1982), 68 C.C.C. (2d) 477, 30 C.R. (3d) 289 (S.C.C.)

## Withdrawal of Guilty Plea

A defendant may change his plea if he can satisfy the court that there are valid reasons for allowing him to do so.

R. v. Bamsey (1960), 125 C.C.C. 329 (S.C.C.)

Generally, the decision either to direct that a plea of not guilty be entered or to permit the defendant to withdraw his original guilty plea and enter a new plea is a matter for the court's discretion, which must be exercised judicially.

Thibodeau v. R. (1955), 21 C.R. 265 (S.C.C.)

Adgey v. R. (1973), 13 C.C.C. (2d) 177, 23 C.R.N.S. 298 (S.C.C.)

However, it seems that a court ought to permit a plea to be withdrawn where the facts alleged by the Crown do not in law constitute the commission of an offence.

R. v. Voorwinde (1976), 29 C.C.C. (2d) 413 (B.C.C.A.)

R. v. Grainger (1978), 42 C.C.C. (2d) 119 (Ont. C.A.)

A plea of guilty may be withdrawn at any time up to the imposition of sentence with the consent of the court.

R. v. Kavanagh (1955), 114 C.C.C. 378 (Ont. C.A.)

After sentence, the court is functus and cannot allow a change of plea.

R. v. Koop, [1958] O.W.N. 394 (Ont. C.A.)

### Examples of Permitted Changes of Plea:

1. Where a defendant never intended to admit to a fact which was an essential ingredient of the offence.  
Adgey v. R. (1973), 13 C.C.C. (2d) 177, 23 C.R.N.S. 298 (S.C.C.)
2. Where a defendant misapprehended the effect of the plea of guilty or never intended to plead guilty at all.  
Adgey v. R. (1973), 13 C.C.C. (2d) 177, 23 C.R.N.S. 298 (S.C.C.)
3. Where the defendant was under the influence of drugs when he entered the plea.  
R. v. Kavanagh (1955), 114 C.C.C. 378 (Ont. C.A.)
4. Where the defendant pleaded guilty to theft on the basis of poor advice of counsel although he had a possible defence of colour of right.  
R. v. Johnson (unreported, Ont. C.A., Dec. 8, 1976, per Brooke J.A.)
5. Where the defendant, who suffered from delusions, showed bizarre behaviour and at times was not in contact with reality, had pleaded guilty under the erroneous belief that he was about to be charged with a more serious offence.  
R. v. Hansen (1978), 37 C.C.C. (2d) 371 (Man. C.A.)
6. Where the defendant pleaded guilty to possession of a narcotic but the substance in question was later found to be a harmless sugar substitute.  
R. v. Laurie (1979), 42 C.C.C. (2d) 311 (N.S.C.A.)
7. Where the defendant was improperly pressured by his counsel to plead guilty notwithstanding his assertion that he was not guilty.  
R. v. Lamoureux (1984), 13 C.C.C. (3d) 101 (Que. C.A.)

### Examples of Refusal to Allow Change of Plea:

1. Where the defendant had pleaded guilty to robbery "because he wanted to get it over with quickly".  
Dore v. R. (1959), 125 C.C.C. 194 (Que. C.A.)

2. Where the defendant pleaded guilty after his lawyer and his father, whose direction he necessarily followed, persuaded him so to plead against his original intentions, and there was no suggestion that there would have been any valid defence.  
R. v. Sode (1975), 22 C.C.C. (2d) 329 (N.S.C.A.)
3. Where a plea on behalf of a defendant who spoke French was entered by his counsel (who also spoke French), and the Crown adduced substantial evidence as to the circumstances without objection by the defendant.  
R. v. Leonard (1976), 29 C.C.C. (2d) 252 (Ont. C.A.)
4. Where a defendant had pleaded guilty and the trial judge subsequently indicated that he would not follow a joint submission of counsel but would impose a more severe sentence.  
R. v. Rubenstein (1987), 41 C.C.C. (3d) 91 (Ont. C.A.), leave to appeal to S.C.C. refused (1988), 28 O.A.C. 320n

### **Plea to Lesser Offence**

Section 45(4) of the **Provincial Offences Act** allows a defendant to plead not guilty to the offence charged but guilty to any other offence. This allows a plea to be entered to an offence which is not necessarily an included offence to the offence charged. The Crown should only consent to such a plea if there is an evidentiary basis and if it would be in the public interest to do so. The Attorney General's directives on plea negotiations should always be kept in mind when this is being considered.

A trial judge has a discretion to refuse to accept a plea of guilty to a lesser offence than the offence charged, even if the Crown consents to the plea. However; before doing so a judge should give great weight to the position of Crown counsel that the plea is appropriate, since the Crown will have considered the public interest before agreeing to the plea.

R. v. Naraindeen (1990), 80 C.R. (3d) 86, 75 O.R. (3d) 120 (Ont. C.A.)

### **Guilty With An Explanation**

A plea of guilty with an explanation must be clear and unequivocal. There can be no conditional plea of guilty.

R. v. Durocher, [1963] 1 C.C.C. 17 (B.C.C.A.)

R. v. Lucas (1983), 9 C.C.C. (3d) 71 (Ont. C.A.), leave to appeal to S.C.C. refused Feb. 2, 1984



A plea of guilty with an explanation should not be accepted unless the court is satisfied, after due inquiry, that the qualification or condition does not derogate from the defendant's intention to enter an unequivocal plea of guilty.

R. v. McNabb (1971), 4 C.C.C. (2d) 316 (Sask. C.A.)

R. v. Mathews (1985), 56 Nfld. & P.E.I.R. 67 (Nfld. Dist. Ct.)

Section 7 of the **Provincial Offences Act** provides a special procedure permitting a defendant who has been served with an offence notice and who does not wish to dispute the charge to appear before a court and make submissions as to penalty. It is submitted that this provision does not go so far as to permit a qualified plea. If the submissions include matters that derogate from the evidentiary basis of the offence, it may be appropriate for the court to permit the guilty plea to be withdrawn and to set a trial date at which the matters can be fully explored.

### **Previous Guilty Plea Admissible**

In general, a guilty plea at trial (whether entered personally or by counsel) is an admission by the defendant, and will be admissible at a subsequent trial.

R. v. Deitrich (1970), 1 C.C.C. (2d) 49, 11 C.R.N.S. 22 (Ont. C.A.),  
leave to appeal to S.C.C. refused (1970), 1 C.C.C. (2d) 68n

R. v. Gushue (No. 3) (1975), 30 C.R.N.S. 173 (Ont. Co. Ct.), aff'd on other  
grounds (1976), 32 C.C.C. (2d) 189, 35 C.R.N.S. 304 (Ont. C.A.), aff'd (1979), 50  
C.C.C. (2d) 417 (S.C.C.)

A plea to a lesser offence that is not accepted by the Crown (see below) may also be admissible at the trial of the offence charged.

R. v. Pentiluk and MacDonald (1975), 28 C.R.N.S. 324 (Ont. C.A.)

However, if a guilty plea is struck or allowed to be withdrawn, it is not admissible at a subsequent trial.

Thibodeau v. R. (1955), 21 C.R. 265 (S.C.C.)

### **Refusal to Accept Plea on Other Counts**

Occasionally, a defendant will attempt to plead guilty to only some of the charges, or plead guilty to a lesser offence, without first obtaining the agreement of the Crown. In such circumstances, the court should, unless the Crown agrees otherwise, proceed on the charges the Crown wishes. A guilty plea on other counts should not be entered until a decision has been rendered on the major count.

Re Dauphney (1975), 29 C.C.C. (2d) 236 (B.C.S.C.)

Loyer v. R. (1978), 40 C.C.C. (2d) 291 (S.C.C.)



## Effect of Guilty Plea on Sentence

As a general principle, a plea of guilty will be a mitigating factor when it comes to sentence, either as evidence of remorse or because it saves the community considerable time and expense.

R. v. Johnston and Tremayne [1970] 4 C.C.C. 64 (Ont. C.A.)

R. v. Shanower (1972), 8 C.C.C. (2d) 527 (Ont. C.A.)

There are exceptions to this general principle. The English Court of Appeal has held that a plea of guilty will lead to little or no discount on sentence where:

- (i) the defendant made a "tactical plea", delaying his plea until the last possible moment in the hope of obtaining some advantage; or
- (ii) where an offender was caught red-handed and there was no realistic alternative to a plea of guilty.

R. v. Costen, [1989] Crim. L.R. 601 (C.A.)

See also R. v. Harris and Edwards (unreported, Ont. Co. Ct., Oct. 8 and 17, 1985, at pp. 100-101, aff'd Feb. 20, 1986, Ont. C.A.)

## Plea by Counsel

Section 50 of the **Provincial Offences Act** seems to permit counsel to appear and enter a plea on behalf of a defendant, subject to the court's discretion to require the defendant to appear personally.

R. v. Deitrich (1970), 1 C.C.C. (2d) 49, 11 C.R.N.S. 22 (Ont. C.A.)  
leave to appeal to S.C.C. refused (1970), 1 C.C.C. (2d) 68n

R. v. McDonald (1913), 21 C.C.C. 229 (P.E.I.S.C.)

## SENTENCE

### Introduction

The **Provincial Offences Act** contains a number of provisions governing the procedure to be followed on sentencing, and gives the court a range of powers.

There are also certain restrictions. In particular, regard should be had to the provisions of s. 12, which restrict the consequences that may follow when a defendant is convicted in a proceeding commenced by certificate of offence under Part I of the **Provincial Offences Act**.

### Provincial Offences Act

See sections 7, 12, 56 - 75, 110, 122, and 123.

### Proof of Prior Convictions

The provisions of s. 57(4) of the **Provincial Offences Act**, which permit the use of certificate evidence to prove prior convictions and sentences without requiring that notice of the intention to produce such certificates be given to the defendant, do not violate ss. 7 or 11(d) of the **Charter**.

R. v. Triumbari (1988), 8 M.V.R. (2d) 1 (Ont. C.A.)

### Availability of Discharge

Absolute and conditional discharges, as provided for by s. 736 of the **Criminal Code**, are not available as sentences for breaches of provincial statutes.

R. v. Gower (1973), 10 C.C.C. (2d) 543, 21 C.R.N.S. 250 (N.S. Co.Ct.)

R. v. Rendall (1974), 21 C.C.C. (2d) 253 (Ont. Co.Ct.)

R. v. Button (1974), 21 C.C.C. (2d) 371 (B.C.S.C.)

Re R. and Webster (1981), 10 M.V.R. 310, 15 M.P.L.R. 60 (Ont. Dist. Ct.)

Note, however, that the **Provincial Offences Act** does provide for absolute discharges as a possible disposition for young offenders.

Provincial Offences Act, s. 97(1)(b)

## Relief Against Minimum Fine

Section 59(2) of the **Provincial Offences Act** provides a means by which the court may impose a fine below the statutory minimum where "exceptional circumstances" exist so that to impose the minimum fine would be unduly oppressive or otherwise not in the interests of justice.

The onus of demonstrating that this test has been met lies on the defendant, and it is an error of law for a judge to make such a finding without enquiry and without evidence of such "exceptional circumstances".

R. v. Jansen (unreported, Ont. Co. Ct., County of Brant, May 24, 1983, per Fanojoy Co. Ct.J.)

This section only permits a court to grant relief against a minimum fine. It does not permit a court to relieve against a mandatory statutory licence suspension, even if the operation of the statutory licence suspension is oppressive and unjust on the facts of the particular case.

R. v. Robertson (1984), 30 M.V.R. 248, 43 C.R. (3d) 39 (Ont. Prov. Ct.)

## Sentences of Imprisonment

A sentence of imprisonment made under the **Provincial Offences Act** is to be served consecutively to any other sentence to which a defendant may be liable, including a sentence under the **Criminal Code**, unless otherwise ordered.

Provincial Offences Act, s. 64

Dempsey v. Canada (1986), 65 N.R. 295 (Fed. C.A.)

Note that s. 72 of the **Provincial Offences Act**, like the **Criminal Code**, permits sentences not exceeding ninety days to be served intermittently.

## SEVERANCE OF COUNTS

### Introduction

It is generally advantageous to the Crown to charge and try together as many offences as the evidence will support. This avoids a multiplicity of proceedings, which can result in greater time and cost and increases the chances of inconsistent verdicts.

Although there is no limit to the number of counts that the Crown may include in a single information, the court may order that a defendant be tried separately on one or more counts.

A severance obviously assists a defendant who wishes to present inconsistent defences to the charges, or who wishes to testify on some charges but not on others.

The principles governing severance of counts are closely related to those governing joinder of counts and joinder and severance of defendants. Cases on those subjects can provide useful guidance on severance of counts.

### Provincial Offences Act

See sections 25, 38(2).

### The General Principle

The policy of the **Criminal Code** is to avoid unnecessary multiple proceedings. This policy is even more applicable to proceedings under the **Provincial Offences Act**.

R. v. McNamara et al. (No. 1) (1981), 56 C.C.C. (2d) 193 (Ont. C.A.), affirmed on other grounds (1985), 19 C.C.C. (3d) 1 (S.C.C.)

### Test

The court may, before or during the trial, order counts to be tried separately where it is satisfied that the ends of justice so require.

The phrase "ends of justice" embraces both the interests of the defendant and the interests of the administration of justice.

R. v. Racco (No. 1) (1975), 23 C.C.C. (2d) 201 (Ont. Co. Ct.)

In determining whether counts should be tried together, the court should consider whether there is an adequate nexus in time, place, and type of offence and whether prejudice to the defendant will result. It should also consider the interests of the administration of justice, including the cost to the taxpayer (and presumably the extra burden placed on the judicial system by separate trials).

R. v. Freedman (1978), 2 C.R. (3d) 345 (Ont. Co. Ct.)

## Onus

The onus lies on the defendant to show, on a balance of probabilities, that the ends of justice require separate trials.

R. v. McNamara et al. (No. 1) (1981), 56 C.C.C. (2d) 193 (Ont. C.A.), affirmed on other grounds (1985), 19 C.C.C. (3d) 1 (S.C.C.)

## Discretionary Order

The question of severance of counts is a matter for the discretion of the trial judge.

R. v. Kestenberg and McPherson (1959), 126 C.C.C. 387 (Ont. C.A.)

R. v. Fischer (1987), 31 C.C.C. (3d) 303 (Sask. C.A.)

The court's exercise of discretion will only be interfered with on appeal if the refusal to grant a severance resulted in a miscarriage of justice.

R. v. McNamara et al. (No. 1) (1981), 56 C.C.C. (2d) 193 (Ont. C.A.) at 265, affirmed on grounds (1985), 19 C.C.C. (3d) 1 (S.C.C.)

R. v. Keshane (1974), 20 C.C.C. (2d) 542 (Sask. C.A.), leave to appeal to S.C.C. refused  
*ibid*

## Arguments for Severance

Most of the arguments for severance are based on the difficulty of instructing a jury on the admissibility of evidence on various counts, or on the possible prejudice that may result from the number or the nature of multiple counts. These arguments should carry little weight where trial is by judge alone or by a justice of the peace.

Some common arguments for severance, with rebuttals, are set out below.

1. Evidence on one count is not admissible on another.

Reply: it is the court's duty and function to separate evidence and apply only the appropriate evidence on each count.

R. v. Morgan et al. (1947), 90 C.C.C. 1 (Ont. C.A.)



2. The volume of evidence would place an unwarranted strain on the court.

Reply: separate trials would not effectively abbreviate the trial since the evidence on the severed counts would generally be admissible as similar act evidence.

R. v. McNamara et al. (No. 1) (1981), 56 C.C.C. (2d) 193 at 264-266 (Ont. C.A.), affirmed on other grounds (1985), 19 C.C.C. (3d) 1 (S.C.C.)

3. Evidence against one defendant charged in a separate count would be prejudicial to another defendant.

Reply: the court can separate evidence and apply it only to the appropriate defendant.

R. v. Kestenberg and McPherson (1959), 126 C.C.C. 387 (Ont. C.A.)

### **Additional Grounds to Oppose Severance**

1. There is a nexus in time, place or method of commission of the various offences.

R. v. C.G.E. Ltd., et al. (1974), 17 C.C.C. (2d) 445 (Ont. H.C.J.)

R. v. Racco (No. 1) (1975), 29 C.R.N.S. 303 (Ont. Co. Ct.)

2. The evidence would be admissible as similar act evidence upon each of the other counts.

R. v. Hatton (1978), 39 C.C.C. (2d) 282 (Ont. C.A.)

R. v. McNamara et al. (1981), 56 C.C.C. (2d) 193 (Ont. C.A.)

### **Charter Issues**

The provisions of the **Provincial Offences Act** permitting joinder of multiple counts in one information do not violate s. 7 of the **Charter**. Where the joinder in a particular case leads to a violation of the defendant's constitutional rights, the appropriate remedy is to order a severance.

R. v. Wolynech (1989), 35 O.A.C. 236 (Ont. C.A.)





## SEVERANCE OF DEFENDANTS

### Introduction

It has long been settled that an information or a count in an information can charge more than one person with the offence therein. This power is continued in the **Provincial Offences Act**, but is subject to the court's discretion to grant a severance.

### Provincial Offences Act

See subsection 38(2).

### The General Principle

Where several persons join in the commission of an offence, all or any number of them may be jointly charged and should *prima facie* be tried together at a single trial.

R. v. De Tonnancourt (1956), 115 C.C.C. 154 at 182-184 (Man. C.A.)

R. v. Lane and Ross (1969), 6 C.R.N.S. 273 (Ont. S.C.)

R. v. McLeod, Pinnock and Farquarson (1983), 6 C.C.C. (3d) 29 (Ont. C.A.), aff'd (1986) 27 C.C.C. (3d) 383 (S.C.C.)

The court ought to hear the whole story at one time, rather than receive only a partial picture which would limit the evidence upon which its judgment would be based.

R. v. Gibbons and Proctor (1918), 13 Cr. App. R. 135 (Eng. C.C.A.)

The court is also concerned with avoiding multiple proceedings and inconsistent verdicts.

### Test

A defendant may be granted a separate trial if he satisfies the court that the ends of justice so require. The court must consider the interests of justice as well as the interests of the defendants.

R. v. Grondowski and Malinowski (1946), 31 Cr. App. R. 116 (Eng. C.C.A.)

R. v. Racco (No. 1) (1975), 23 C.C.C. (2d) 201 (Ont. Co. Ct.)

## Matter of Discretion

A defendant has no absolute right to a separate trial. The order is a matter for the discretion of the court. This discretion must be exercised judicially, and an appellate court will refuse to interfere unless the refusal to grant a separate trial has resulted in a miscarriage of justice.

R. v. Weir and others (No. 4) (1899), 3 C.C.C. 351 (Que. Q.B.)

R. v. Kestenberg and McPherson (1959), 126 C.C.C. 387 (Ont. C.A.)

R. v. Quiring and Kuipers (1975), 19 C.C.C. (2d) 337 (Sask. C.A.), appeal to S.C.C. dismissed November 4, 1974

R. v. Agawa and Mallett (1975), 28 C.C.C. (2d) 379 (Ont. C.A.)

## Timing of Application

It appears that an application for severance may be made prior to trial; it need not be immediately prior, but can be brought at any time prior to trial. The judge or justice hearing the application does not thereby become seized with the trial.

R. v. Deol, Gill and Randev (1979), 51 C.C.C. (2d) 40 (Alta. Q.B.)

R. v. Lapointe and Sicotte (1981), 64 C.C.C. (2d) 562 (Ont. G.S.P.)

The application should preferably be made before the trial commences; however, it may be made or renewed during trial if a failure to sever would result in a miscarriage of justice.

R. v. Cassidy and Letendre, [1963] 2 C.C.C. 219 (Alta. C.A.)

## Common Enterprise

Where the essence of the case is that the defendants were engaged in a common enterprise, they should be tried together. Partners or parties in an unlawful act should generally not be separated.

R. v. Grondowski and Malinowski (1946), 31 Cr. App. R. 116 (Eng. C.C.A.)

R. v. Agawa and Mallett (1975), 28 C.C.C. (2d) 379 (Ont. C.A.)

R. v. McNamara et al. (No. 1) (1981), 56 C.C.C. (2d) 193 (Ont. C.A.)

However, where each of three defendants was alleged to have conspired independently with a fourth person (who would be appearing as a Crown witness) in one of three separate incidents, an order for severance was held to be appropriate.

R. v. Kourouklis (1986), 50 C.R. (3d) 186 (Que. S.C.)

### Language of Co-Defendant

The fact that a co-defendant will require an interpreter, which could interfere with the smooth conduct of a trial, is not a reason that would justify a severance.

R. v. Sunila (1987), 35 C.C.C. (3d) 289 (N.S.C.A.)

Where one co-defendant seeks a trial in English and the other seeks a trial in French, and both are statutorily entitled to a trial in the language requested, the appropriate course of action is to order a bilingual trial rather than severance of the co-defendants.

R. v. Lapointe and Sicotte (1981), 64 C.C.C. (2d) 562 (Ont. G.S.P.)

See the Courts of Justice Act, ss. 108, 135, 136, and O. Reg. 12/87, for provisions governing the language of trial in proceedings under the Provincial Offences Act

### Unequal Strength of Evidence

It has been suggested that wherever the evidence at a joint trial of two co-conspirators is substantially stronger against one than the other, the safer course is to direct the separate trial of each.

Guimond v. R. (1979), 44 C.C.C. (2d) 481, 8 C.R. (3d) 185 (S.C.C.)

It is doubtful whether this factor should be given much weight where trial is by judge alone.

### Grounds Advanced For Separate Trials

Many of the arguments for severance have been developed in the context of jury trials. These should carry little weight where trial is by judge alone, particularly where the concern is that the trier of fact will improperly allow evidence inadmissible against one defendant to influence its verdict.

1. Defendants have antagonistic or "cut-throat" defences, i.e., each will attempt to blame other.

Rebuttal: the fact that one defendant blames the other is only a factor to be taken into account.

R. v. Gibbons and Proctor (1918), 13 Cr. App. R. 135 (Eng. C.C.A.)

R. v. Cassidy and Letendre, [1963] 2 C.C.C. 219 (Alta. C.A.)

If defences are antagonistic, it may be better for the innocent party, as well as for the administration of justice, if the same trier of fact hears all the evidence and is able to fix the guilt where it belongs.

R. v. Lane and Ross, [1970] 1 C.C.C. 196 (Ont. H.C.)

2. One defendant is claiming that other coerced him into committing the offence.

Rebuttal: it would not be proper to separate defendants and deprive the court of the opportunity to see the alleged coercer.

R. v. Grondowski and Malinowski (1946), 31 Cr. App. R. 116 (Eng. C.C.A.)

3. Evidence, such as a statement of one defendant which would not be admissible against other defendant on a separate trial, would be admitted on joint trial and would thereby prejudice the other defendant.

Rebuttal: it is the duty and function of the court to separate evidence and instruct itself to apply certain evidence only to certain defendants.

R. v. Christie (1914), 10 Cr. App. R. 141 (Eng. C.C.A.)

R. v. Cassidy and Letendre, [1963] 2 C.C.C. 218 (Alta. C.A.)

R. v. Emkeit and 12 others (1971), 3 C.C.C. (2d) 309 (Alta. C.A.)

R. v. Starr et al., [1965] 3 C.C.C. 138 (Man. Q.B.)

4. One of the defendants, if severed, could give evidence for other defendant; that is, the severed defendant would be competent and compellable for the defence on a separate trial.

Rebuttal: the combined effect of s. 8(1) of the **Ontario Evidence Act** and s. 46(5) of the **Provincial Offence Act** would appear to be that a defendant is a competent and compellable witness at the instance of a co-defendant. While this may be subject to attack under s. 11(c) of the **Charter**, an argument may be made that ss. 8(1) and 9(2) of the **Ontario Evidence Act**, when read together, constitute a reasonable limit on the s. 11(c) right as they balance the interests of the defendant and co-defendant.

5. Not all defendants are charged with all the same counts.

Rebuttal: it is the duty of the court to separate the evidence and apply it to each individual defendant.

R. v. Morgan et al. (1947), 90 C.C.C. 1 (Ont. C.A.)

R. v. Kestenberg and McPherson (1959), 126 C.C.C. (Ont. C.A.)

6. Severance should be granted based on the length of trial, the complexity of the evidence, and the number of counts and defendants.

Rebuttal: These considerations by themselves are insufficient for severance; it must be shown that severance is required in the interests of justice. In addition, there will be no benefit to severance where the evidence on counts sought to be severed would be admissible as similar fact evidence.

R. v. McNamara (No. 1) (1981), 56 C.C.C. (2d) 193 (Ont. C.A.) affirmed on other grounds (1985), 19 C.C.C. (3d) 1 (S.C.C.)

### **Additional Grounds Against Separate Trials**

1. The usual grounds for severance, given in **The Queen v. Weir (No. 4)** (1899), 3 C.C.C. 351 (Que. Q.B.), although referred to frequently are not rules of law but only matters to be considered on the motion. Modern courts are capable of sorting evidence and applying it according to the rules of evidence.

R. v. Lane and Ross (1969), 6 C.R.N.S. 273 (Ont. S.C.)

2. Granting separate trials may lead to miscarriage of justice when two separate courts arrive at different verdicts upon the same evidence.

R. v. Lane and Ross (1969), 6 C.R.N.S. 273 (Ont. S.C.)

3. Since 1974, in Ontario, a defendant may cross-examine a co-defendant who testifies, whether the latter's evidence is favourable or unfavourable. This right of cross-examination is not subject to any restriction that does not apply equally to the cross-examination of any other witness.

R. v. McLaughlin (1974), 15 C.C.C. (2d) 562 (Ont. C.A.)





## STAY OF PROCEEDINGS

### Introduction

The **Provincial Offences Act** permits the Attorney General, either personally or by agent to stay any proceeding at any time up to the point of judgment. This power is separate and distinct from the court's power to enter a judicial stay of proceedings as a remedy for abuse of process or a violation of rights guaranteed under the **Charter** and exists as an exceptional power for exceptional circumstances. Such a circumstance might exist where the ruling of a judge might improperly result in the disclosure of the identity of an informant or the existence of some undercover investigation or where a pivotal Crown witness under subpoena is suddenly taken ill.

### Provincial Offences Act

See section 32

### Entry of Stay

A stay of proceedings can be entered at any point after a proceeding has been commenced by the laying of an information or the filing of a certificate of offence. It is not necessary to wait until the justice should determine whether some process should issue to compel the attendance of the defendant.

Campbell v. A.G. Ontario (1987), 31 C.C.C. (3d) 289 (Ont. H.C.), affirmed (1987), 35 C.C.C. (3d) 480n (Ont. C.A.)

Re Pardo and R. (1990), 62 C.C.C. (3d) 371 (Que. C.A.)

Cf. Re Dowson and R. (1983), 7 C.C.C. (3d) 527 (S.C.C.)

A direction to enter a stay of proceedings is made to the clerk of the court, not to the presiding judge or justice. The judge or justice would seem to have no discretion to refuse, or prevent, the entry of a stay.

### Recommencement

It would appear from s. 32(2) of the **Provincial Offences Act** and s. 2 of the **Crown Attorneys Act** that an Assistant Crown Attorney can direct a recommencement of a stayed proceeding.

Crown Attorneys Act, R.S.O. 1990, c. 49, s. 2



## SURPLUSAGE

### Introduction

The issue of surplusage arises when the defence argues that the Crown has failed to prove one or more of the averments in the original count, the count as amended, or any particulars which have become part of the information.

### Provincial Offences Act

See sections 25, 34, 35 and 37.

### The General Rule

If a particular in an information, whether as originally drafted or as subsequently supplied, is not essential to constitute the offence, it will be treated as surplusage; i.e., as a matter which it is not necessary to prove.

Vezina v. R. (1986), 23 C.C.C. (3d) 481 (S.C.C.), quoting with approval E. Ewaschuk, *Criminal Pleadings and Practice in Canada* (1983) at 222-223

### The Proviso

It is now clear that this "surplusage rule" is subject to a proviso: the defendant must not have been misled or prejudiced in the conduct of the defence by the failure of the Crown to prove the item alleged to be surplusage.

Vezina v. R. (1986), 23 C.C.C. (3d) 481 (S.C.C.)

It would appear that the test to be applied is whether there is some indication on the record and the proceedings at trial that the defendant may have been prejudiced by the failure of the Crown to prove the item alleged to be surplusage.

Vezina v. R. (1986), 23 C.C.C. (3d) 481 (S.C.C.)

Hawkshaw v. R. (1986), 23 C.C.C. (3d) 129, 51 C.R. (3d) 289 (S.C.C.)

Failure to prove a matter that is both technical and unrelated to the merits of the charge does not result in prejudice, and will not bar a conviction. For example, where the defence would not have been conducted any differently, and where the only prejudice alleged is the technical failure of the Crown to prove some non-essential particular, the surplusage rule will apply and the defendant will be convicted.

R. v. Melo (1986), 29 C.C.C. (3d) 173 (Ont. C.A.)

### Examples of Surplusage

The following are examples of matters that have been found to constitute surplusage in various cases. Care must be taken, however, in applying these. The important consideration is not the nature of the matter itself, but whether in the circumstances of the particular case the item falls within the general rule set out above and is not caught by the proviso.

1. The licence number of a stolen car.  
R. v. Van Hees (1958), 27 C.R. 14 (Ont. C.A.)
2. A "geiger counter", when other named items in the same count were proved to be stolen.  
R. v. Kestenberg and McPherson (1959), 126 C.C.C. 387 (Ont. C.A.)
3. The failure to prove that both a knife and a revolver were used on a charge of robbery.  
R. v. Roberts (1981), 18 C.R. (3d) 191 (Ont. C.A.)
4. The words "making an arrest" in a charge of assaulting a police officer.  
R. v. Lowry et al. (1971), 2 C.C.C. (2d) 39 (Man. C.A.)  
Cf. R. v. Doiron (1960), 129 C.C.C. 283 (B.C.C.A.)
5. The words "The Water Tower Inn" on a charge of appearing in an immoral performance.  
R. v. MacLean; R. v. Hilsinger (1981), 58 C.C.C. (2d) 318 (Ont. C.A.)
6. The licence number of the car on a charge of impaired driving.  
R. v. Duplin (1959), 126 C.C.C. 400 (B.C.S.C.)
7. The serial number on a radio alleged to have been stolen.  
R. v. Cousineau (1982), 1 C.C.C. (3d) 293 (Ont. C.A.)

### Wrong Section Number of Statute

The reference to the number of the section in the statute creating the alleged offence is surplusage and therefore any error in it is not a fatal defect, provided the information otherwise complies with s. 25 of the **Provincial Offences Act**.

- R. v. International Nickel Co. (1972), 8 C.C.C. (2d) 557 (Ont. H.C.J.)  
R. v. Royka (1980), 52 C.C.C. (2d) 368 (Ont. C.A.)  
R. v. Mansfield (1982), 50 N.S.R. (2d) 706 (N.S.C.A.)

## WITHDRAWAL OF CHARGES

### Introduction

Although the **Criminal Code** contains no provision regarding the withdrawal of charges, the **Provincial Offences Act** recognizes the common law right of Crown counsel to withdraw charges.

### Provincial Offences Act

See s. 32.

### Crown Only to Withdraw

The court cannot of its own motion withdraw a charge. Only the Crown has the power to withdraw a charge, or to request a withdrawal.

R. v. Garcia and Silva, [1970] 3 C.C.C. 124 (Ont. C.A.)

### Prior to Plea

The Crown has an absolute right to withdraw a charge prior to plea, and the court cannot refuse to permit the Crown to do so.

Re Forrester and R. (1977), 33 C.C.C. (2d) 221 (Alta. S.C.)

Re Blasko and R. (1976), 29 C.C.C. (2d) 321 (Ont. H.C.J.)

R. v. Banton (unreported, Ont. C.A., June 16, 1976)

R. v. Osborne (1976), 25 C.C.C. (2d) 405 (N.B.C.A.)

### After Plea

The Crown may withdraw a charge after plea only with leave of the court. It does not appear necessary that evidence be tendered for the court to have control over whether the information may be withdrawn.

R. v. Hatherley (1971), 4 C.C.C. (2d) 242 (Ont. C.A.), leave to appeal to S.C.C. refused  
*ibid*



### Effects of a Withdrawal

A withdrawal of a charge after plea, but before any evidence has been tendered does not amount to an adjudication that would give rise to a successful plea of autrefois acquit could succeed if this information has been retained.

Re Bond (1936), 66 C.C.C. 271 (N.S.S.C.)

R. v. Osborne (1976), 25 C.C.C. (2d) 405 (N.B.C.A.)

Bonli v. Gosselin (1982), 25 C.R. (3d) 303 (Sask. C.A.)

R. v. Selhi (1985), 18 C.C.C. (3d) 131 (Sask. C.A.), aff'd. (1990), 53 C.C.C. (3d) 576 (S.C.C.)

When a charge is withdrawn against one defendant, he may be compelled to testify against the remaining defendants.

R. v. Dick, [1969] 1 C.C.C. 147 (Ont. H.C.)

Once a charge is withdrawn, the court has no jurisdiction to proceed any further with the matter.

Re Blasko and R. (1976), 29 C.C.C. (2d) 321 (Ont. H.C.J.)

### Compared to a Stay of Proceedings

The terms "stay of proceedings" and "withdrawal" are not synonymous. When a charge is withdrawn there is no charge on record, and in order to continue the prosecution a new charge must be laid. A withdrawal, then, brings the proceedings to a close. Where a stay has been entered, however, the proceedings are merely suspended and may be resumed (subject to the limitations contained in s. 32 of the **Provincial Offences Act**).

R. v. Leonard, *ex parte* Graham (1962), 133 C.C.C. 230 (Alta. S.C.)

## YOUNG OFFENDERS

### Introduction

The **Provincial Offences Act** contains special provisions governing proceedings where the defendant is a "young person".

### Provincial Offences Act

See sections 93 to 108.

### Definition of "Young Person"

For the purposes of the **Provincial Offences Act**, a "young person" is a person who is twelve years of age or more, but under the age of sixteen years, at the time the offence was committed. This should be contrasted with the federal **Young Offenders Act**, which applies to persons up to the age of eighteen years.

### Process

An offence notice under Part I is not available for a young person (although a summons under Part I is still available). Accordingly, a court appearance is necessary in all cases of proceedings against a young person.

### Notice to Parents

Where a summons or recognizance is served on a young person, notice shall be given as soon as practicable to the parent of the young person by delivering to the parent a copy of the summons or recognizance.

Where a young person has been arrested, and is not released, the parent of the young person shall be notified as soon as possible of the arrest, the reason for the arrest, and the place of detention.

Failure to give notice of a summons or recognizance does not invalidate the proceedings against the young person.

## Arrest

If a provincial statute allows for the arrest of an adult, a young person may be arrested without warrant where it is necessary to establish the identity of the young person or to prevent the continuation or repetition of an offence that seriously endangers the young person or the person or property of another. The young person shall be released unless the grounds for arrest continue in which case a bail hearing must be held.

## Trial

A trial against a young person cannot proceed without the attendance of the young person, although there are certain circumstances where a young person who has attended at trial may be permitted to leave or ordered to be removed.

Provincial Offences Act, ss. 52, 98

## Sentence Options

In proceedings commenced by certificate of offence, the possible dispositions are fines of three hundred dollars or the set fine, whichever is less, a probation order not exceeding ninety days, or an absolute discharge.

In proceedings commenced by a Part III information, the possible dispositions are a fine not exceeding one thousand dollars, a probation order not exceeding one year and an absolute discharge.

No custodial sentences are available for young persons, except for the offence of breach of probation under s. 75(d) of the **Provincial Offences Act**.





## TABLE OF CONTENTS

## EVIDENCE

ACCOMPLICES .....	E1-1
Introduction .....	E1-1
Definition of Accomplice .....	E1-1
Corroboration of Accomplice Evidence .....	E1-1
Crown Calling An Accomplice .....	E1-2
Defence Witnesses .....	E1-2
 ADVERSE WITNESS .....	 E2-1
Introduction .....	E2-1
Refreshing Memory .....	E2-1
Ontario Evidence Act, s. 23 .....	E2-2
Meaning of "Adverse" .....	E2-2
Meaning of "Inconsistent" .....	E2-2
Method of Proving Adversity .....	E2-3
Oral or Written Statements .....	E2-3
Proof of Prior Inconsistent Statement .....	E2-3
Residual Discretion of Judge .....	E2-4
Effect of Prior Inconsistent Statement .....	E2-4
Right to Cross-Examine under s. 23 .....	E2-4
Use of s. 23 on Re-Examination .....	E2-4
Procedure for Use of s. 23 .....	E2-5
Cross-Examination of Hostile Witness .....	E2-6
 ALIBI .....	 E3-1
Introduction .....	E3-1
Alibi And Other Defences .....	E3-1
Disclosure of Alibi .....	E3-1
Order of Alibi Evidence .....	E3-2
Failure of Defendant to Testify .....	E3-2
Reply Evidence .....	E3-2
Consideration of Alibi as a Defence .....	E3-3
Degree of Proof .....	E3-3
Inferences from an Alibi Which is not Accepted .....	E3-3
Contradictory Alibi Statements .....	E3-4
Attacking an Alibi Defence .....	E3-4



BURDEN OF PROOF .....	E4-1
Introduction .....	E4-1
Evidential Burden .....	E4-1
Burden of Persuasion .....	E4-2
Provincial Offences .....	E4-3
Charter of Rights .....	E4-3
Burden of Proof for Defences .....	E4-4
 CIRCUMSTANTIAL EVIDENCE .....	 E5-1
Introduction .....	E5-1
Admissibility of Circumstantial Evidence .....	E5-1
Probative Weight .....	E5-2
Rule in Hodge's Case .....	E5-2
 CROSS-EXAMINATION .....	 E6-1
Introduction .....	E6-1
Provincial Offences Act .....	E6-1
Scope of Cross-Examination .....	E6-1
Ordinary Rules of Evidence Apply .....	E6-1
Judicial Interference .....	E6-1
Who May Cross-Examine .....	E6-2
Sequence of Cross-Examinations .....	E6-3
Cross-Examination on Prior Inconsistent Statement .....	E6-3
Procedure for Prior Inconsistent Statements .....	E6-6
Cross-Examination of Defendant on Prior Testimony .....	E6-7
Cross-Examination on Documents .....	E6-7
Cross-Examination of Own Witness .....	E6-8
Cross-Examination as to Previous Convictions .....	E6-8
What is "Conviction" for Purposes of Cross-Examination .....	E6-9
Previous Convictions not to Include Provincial Offences .....	E6-10
Discretion to Disallow Questions to Defendant as to Convictions .....	E6-10
Procedure for Cross-Examination as to Convictions .....	E6-11
Cross-Examination of Defendant on Discreditable Conduct .....	E6-11
Rule Against Rebuttal on Collateral Issues .....	E6-11
Cross-Examination on Documents used to Refresh Memory .....	E6-12
Requirement of Cross-Examination if Contradiction Planned .....	E6-12
Witness Not to Comment on Veracity of Other Witness .....	E6-13
Suggestions for Cross-Examination .....	E6-13

DOCUMENTARY EVIDENCE .....	E7-1
Introduction .....	E7-1
Ontario Evidence Act .....	E7-1
Authenticity .....	E7-1
Use of Documentary Evidence in Court .....	E7-2
The Best Evidence Rule .....	E7-2
Exceptions to the Best Evidence Rule .....	E7-3
Statutory Exceptions to the Best Evidence Rule .....	E7-4
The Hearsay Rule .....	E7-4
Common Law Exceptions to the Hearsay Rule .....	E7-5
Statutory Exceptions to the Hearsay Rule .....	E7-6
Business Records .....	E7-6
Original Evidence .....	E7-8
Accountant's Summary of Exhibits .....	E7-9
Judicial Documents .....	E7-10
Cross-Examination on Documents .....	E7-10
Copies of Documents .....	E7-10
Documents Filed under Highway Traffic Act .....	E7-10
EXAMINATION-IN-CHIEF .....	E8-1
Introduction .....	E8-1
Provincial Offences Act .....	E8-1
Purpose .....	E8-1
Leading Questions .....	E8-1
Exceptions to the Rule Against Leading Questions .....	E8-1
Residual Discretion of Court .....	E8-3
Suggestions for Examination-in-Chief .....	E8-3
Defendant Must be Given an Opportunity to Testify in Chief .....	E8-5
Defendant's Absolute Right to Call a Witness .....	E8-5
EXCEPTIONS, EXEMPTIONS, AUTHORIZATIONS, OR QUALIFICATIONS .....	E9-1
Introduction .....	E9-1
Statutory Provisions .....	E9-1
Scope of the Rule .....	E9-1
Examples .....	E9-2
Burden of Proof .....	E9-4
Satisfying the Burden of Proof .....	E9-4
Application to General Defences .....	E9-4
Reasonable Excuse .....	E9-5
Charter Issues .....	E9-5

HEARSAY .....	E10-1
Introduction .....	E10-1
Definition .....	E10-1
Rationale for the Rule .....	E10-2
Application of the Rule .....	E10-3
Admissibility for Limited Purpose .....	E10-3
Conduct as Hearsay .....	E10-3
Implied Assertions .....	E10-4
Negative Matters .....	E10-5
Reasonable Grounds .....	E10-6
Use of Interpreters .....	E10-6
Prior Statements .....	E10-6
Non-Hearsay Use of Words .....	E10-7
Common Law Exceptions to the Hearsay Rule .....	E10-8
Admissions by Party .....	E10-9
Dying Declarations .....	E10-11
Statements about Contemporaneous Physical or Mental Condition .....	E10-11
Declarations of State of Mind or Intention .....	E10-11
Declarations Against Interest .....	E10-13
Evidence of Prior Identification .....	E10-15
Evidence of Age .....	E10-16
Measuring Devices and Scientific Instruments .....	E10-16
Observations Recorded by Others: The "Licence Plate Problem" .....	E10-17
Constitutional Exceptions .....	E10-17
New Exceptions .....	E10-18
 IDENTIFICATION .....	 E11-1
Introduction .....	E11-1
Proving Defendant was Person Charged .....	E11-1
Description as "Defendant" .....	E11-4
Direct Identification of Offender .....	E11-4
Opportunity to Perceive and Recall .....	E11-5
Line-ups .....	E11-7
Photographs .....	E11-7
Identification in Court .....	E11-9
Effect of Improper Identification Techniques .....	E11-9
Discrepancies in Description .....	E11-10
Circumstantial Evidence Supporting Identification .....	E11-10
Effect of Prior Failure to Identify .....	E11-11

IDENTIFICATION (continuation)	
Expert Evidence on Identification Evidence . . . . .	E11-11
Identification of Offender in Videotape . . . . .	E11-11
Drawings . . . . .	E11-12
Voice Identification . . . . .	E11-12
Other Methods of Identification . . . . .	E11-13
Evidence of Prior Description or Identification . . . . .	E11-13
Identification and Res Gestae . . . . .	E11-14
 JUDICIAL NOTICE . . . . .	 E12-1
Introduction . . . . .	E12-1
The General Principle . . . . .	E12-1
Matters of General Knowledge . . . . .	E12-2
Reference to Sources of Unquestioned Accuracy . . . . .	E12-2
Procedure for taking Judicial Notice . . . . .	E12-3
Effect of Judicial Notice . . . . .	E12-4
Examples Where Judicial Notice of Fact Taken . . . . .	E12-4
Examples Where Judicial Notice of Fact Not Taken . . . . .	E12-4
Radar Devices . . . . .	E12-5
Geography and Territorial Jurisdiction . . . . .	E12-5
Judicial Notice of Law . . . . .	E12-6
Regulations . . . . .	E12-6
Bylaws . . . . .	E12-7
Foreign Law . . . . .	E12-7
Judicial Notice of Law Not Yet in Force . . . . .	E12-8
 OPINION EVIDENCE . . . . .	 E13-1
Introduction . . . . .	E13-1
Opinions of Lay Witnesses . . . . .	E13-1
Examples Where Lay Opinion Permitted . . . . .	E13-2
Admissibility of Expert Opinion . . . . .	E13-3
Examples where Expert Opinion Allowed . . . . .	E13-4
Examples where Expert Opinion Not Allowed . . . . .	E13-5
Expert Evidence on Matters of Law . . . . .	E13-6
Expert Opinion on Credibility . . . . .	E13-7
Who May Give Expert Opinion Evidence . . . . .	E13-8
Examples of Persons Qualified as Experts . . . . .	E13-8

## OPINION EVIDENCE (continuation)

Examples of Persons Not Qualified as Experts .....	E13-9
Persons Operating Scientific Instruments .....	E13-9
Adducing Expert Opinion .....	E13-9
Qualifying Opponent's Witness as Expert .....	E13-11
Maximum Number of Experts .....	E13-11
Factual Basis of Expert Opinion .....	E13-12
Use of Textbooks .....	E13-13
Hypothetical Questions .....	E13-14
Opinion as to Ultimate Issue .....	E13-14
Cross-Examination of Experts .....	E13-15
Evaluation of Expert Opinion .....	E13-17

PHOTOGRAPHS, FILM AND VIDEOTAPE .....	E14-1
Introduction .....	E14-1
Purposes of Photographic Evidence .....	E14-1
Technical Criteria for Admissibility .....	E14-2
Discretion of Trial Judge .....	E14-3
Examples of Photographs Admitted .....	E14-4
Colour Photographs .....	E14-5
Film and Videotape .....	E14-5
Photos Found in Possession of Defendant .....	E14-6

REASONABLE DOUBT .....	E15-1
Introduction .....	E15-1
Definition .....	E15-1
Proof to a Moral Certainty .....	E15-2
Beyond any Peradventure of Doubt or Beyond Any Shadow of a Doubt ..	E15-3
Existence of Possibilities .....	E15-3
Prima Facie Case .....	E15-3
Test Applies to Elements of Offence .....	E15-4
Application to Credibility .....	E15-4
Evidence of Defence Witnesses .....	E15-5



RE-EXAMINATION .....	E16-1
Introduction .....	E16-1
Right of Re-Examination .....	E16-1
Scope of Re-Examination .....	E16-1
Leading Questions .....	E16-2
Prior Consistent Statements .....	E16-2
Prior Inconsistent Statement .....	E16-2
Admittance of Prejudicial Information .....	E16-3
Re-Cross-Examination .....	E16-3
 REFRESHING MEMORY .....	 E17-1
Introduction .....	E17-1
Methods of Using Notes .....	E17-1
Prerequisites for Use of Notes .....	E17-1
Examples of Past Recollection Recorded .....	E17-3
Qualifying Notes .....	E17-3
Prior Use of Notes .....	E17-4
Use of Copies of Notes .....	E17-4
Use of Transcriptions of Notes .....	E17-5
Use of Notes Prepared by Others .....	E17-5
Use of Notes Prepared Jointly .....	E17-5
Use of Tape Recordings .....	E17-6
Entering Material as Exhibit .....	E17-6
Refreshing Memory from Transcripts of Earlier Hearing .....	E17-6
Use of Inadmissible Evidence to Refresh Memory .....	E17-7
The "Licence Plate" Problem .....	E17-8
Production of Documents used to Refresh Memory .....	E17-9
Production and Claims of Privilege .....	E17-10
 RELEVANCE .....	 E18-1
Introduction .....	E18-1
Meaning of Relevance .....	E18-1
Relevance and Admissibility .....	E18-1
Relevance and Probative Weight .....	E18-2
Relevance on Multiple Grounds .....	E18-2
Conditional Relevance .....	E18-3
Discretion to Exclude Relevant Evidence .....	E18-3



RE-OPENING THE CASE .....	E19-1
Introduction .....	E19-1
Discretion of the Trial Judge .....	E19-1
Test for Re-Opening .....	E19-2
Conduct of Defence Counsel .....	E19-2
Timing of Motion .....	E19-3
Evidence by Defence Following Re-Opening .....	E19-3
Re-Opening of Voir Dire .....	E19-3
New Evidence .....	E19-4
Re-Opening the Defence .....	E19-4
Examples of Re-Opening .....	E19-4
 REPLY EVIDENCE .....	 E20-1
Introduction .....	E20-1
The General Principle .....	E20-1
Discretion to Permit Reply Evidence .....	E20-2
Elements of the Offence .....	E20-2
Defence Broadening Issues .....	E20-3
Evidence Rebutting Defence Evidence .....	E20-3
Evidence Rebutting Alibi .....	E20-4
Effect of Presumption .....	E20-5
Reply Evidence on Collateral Matters .....	E20-5
Evidence of Bad Character .....	E20-6
Sur-Rebuttal Evidence .....	E20-6
Failure of Lawyer to Object .....	E20-7
 RES GESTAE .....	 E21-1
Introduction .....	E21-1
Admissibility of <i>Res Gestae</i> Statements .....	E21-1
Definition of <i>Res Gestae</i> .....	E21-2
What Constitutes "Transaction" .....	E21-2
Requirements for Admissibility .....	E21-3
Contemporaneity and Spontaneity .....	E21-3
Exceptions to Contemporaneity Rule .....	E21-4
Relaxed Rules of Contemporaneity for Children .....	E21-5
Use of Statement for Purposes of Identification .....	E21-5
On a Possession Charge .....	E21-5

STATEMENTS .....	E22-1
Introduction .....	E22-1
Person in Authority .....	E22-1
The Purpose of a Voir Dire .....	E22-3
Voir Dire on Exculpatory and Inculpatory Statements .....	E22-4
No Necessity for a Voir Dire .....	E22-4
Procedure in a Voir Dire .....	E22-4
Written Statements .....	E22-5
Use of Statement by Crown .....	E22-5
Use of Statement by Accused .....	E22-6
Fear or Prejudice .....	E22-7
Threats or Intimidation .....	E22-8
Inducements .....	E22-9
Oppression .....	E22-9
Statements Obtained by Trickery .....	E22-10
Defendant's State of Mind .....	E22-10
Language Difficulties .....	E22-10
The Reading of an Accused's Rights .....	E22-11
Statements Made under Statutory Compulsion .....	E22-11
Series of Statements .....	E22-11
Statements Made by Co-conspirators .....	E22-11
Statements Made by Co-Accused/Others in the Presence of the Accused .....	E22-12
Confirmation by Subsequent Facts .....	E22-13



## ACCOMPLICES

### Introduction

The common law viewed the trustworthiness of accomplice testimony with suspicion. It was felt there was a risk that an accomplice would attempt to escape punishment, either by shifting the blame for his actions to others or by perjuring himself in return for a promise of immunity.

Although the strict rules governing accomplice evidence and corroboration have been abolished (see "Corroboration of Accomplice Evidence", *infra*), the court must still be alive to the dangers that such evidence presents.

### Definition of Accomplice

An accomplice is anyone who has criminally (not innocently) co-operated with, assisted or even encouraged another to commit a crime. He is a partner in the crime or one who could also have been charged with the offence.

MacDonald v. R. (1946), 87 C.C.C. 257 (S.C.C.)

### Corroboration Of Accomplice Evidence

Before 1982, it was necessary for the trial judge to warn the jury (or if sitting alone to instruct himself at least implicitly) that it was dangerous to base a conviction on the evidence of an accomplice unless that evidence was corroborated in a material particular by evidence which implicated the defendant. The trier of fact could convict on the accomplice evidence alone, but had to be instructed that it was dangerous to do so. This led to such further issues as who might be an accomplice, who in fact was an accomplice, what evidentiary items might be corroborative and what items were in fact corroborative.

In 1982, the unnecessarily complex judge-made law of corroboration was abolished by the Supreme Court of Canada. The court recognized that while the testimony of some accomplices may be untrustworthy, there may be other categories of witnesses who may be untrustworthy and not all accomplices are necessarily untrustworthy. There are now no special rules applying to "accomplices". An accomplice is to be treated like any other witness at trial. The trier of fact should direct his mind to the evidence and thoroughly examine all the factors that bear on the credibility of the witness and the weight that should be given to his evidence.

Vetrovec v. R. (1982), 67 C.C.C. (2d) 1 (S.C.C.)

R. v. Hayes (1989), 48 C.C.C. (3d) 161 (S.C.C.)

These decisions do not deny that there may in some cases be dangers in relying on the testimony of an accomplice, or any other witness whose evidence might be unreliable (such as a witness with a record for perjury). Rather, they require the court to look to the evidence of the particular witness in all the circumstances and determine if such dangers are present.

An accomplice's demeanour while giving evidence may justify a finding that a witness is credible, notwithstanding the existence of the potential dangers in accepting accomplice evidence and the absence of any supporting evidence.

R. v. Ertel (1987), 35 C.C.C. (3d) 398 (Ont. C.A.), leave to appeal to S.C.C. refused (1987) 36 C.C.C. (3d) vi

### **Crown Calling An Accomplice**

Where an accomplice is tried separately or is not charged, he is a competent and compellable witness for the Crown. To remove any incentive for the accomplice to seek favour with the prosecution or to minimize his role by shifting the blame to the others, it is preferable to have the proceedings against the accomplice completed, including sentencing, before he testifies.

R. v. Canning (1937), 68 C.C.C. 321 at 322, 323 (S.C.C.)

However, the fact that an accomplice has not yet been tried or sentenced goes only to the weight of his evidence. The evidence is still admissible. Moreover, its admission does not violate s. 7 of the **Charter**, even if there is no independent evidence to corroborate it.

R. v. Cruikshanks (1990), 58 C.C.C. (3d) 26 (B.C.C.A.)

The Crown may elicit from the accomplice during examination in chief the fact that he has already been tried and sentenced for the offence.

R. v. Lessard (1982), 10 C.C.C. (3d) 61 (Que. C.A.)

As a matter of practice, any admissible evidence which confirms the testimony of the accomplice should be led and drawn to the attention of the trier of fact. This will help bolster the credibility of the witness.

### **Defence Witnesses**

While a trier of fact may caution himself or herself generally that the character of witnesses is one factor to consider in assessing the weight to be given to their evidence, it is an error for the trier of fact to charge himself or herself that certain defence witnesses are of "unsavoury character" whose evidence must be considered "especially carefully", even where a similar warning was given for certain Crown witnesses. The

special warning should only be given in relation to witnesses whose evidence assists in the demonstration of guilt.

R. v. Hoilett (1991), 4 C.R. (4th) 372 (Ont. C.A.)



E14

EVIDENCE

## ADVERSE WITNESS

### Introduction

Occasionally during examination in chief, a witness will give evidence that is not what the examiner expects. When this happens, counsel has several options. In some cases, the wisest course is to cease questioning before more damage is done. However, where counsel has a prior statement of the witness that is inconsistent with the evidence given by the witness in court, counsel may want to have the witness return to the earlier version, or may at least want to discredit the evidence given in court. This may be done by having the witness refresh his or her memory from the prior statement, confronting the witness with the prior inconsistent statement using the procedure in s. 23 of the Ontario **Evidence Act**, or obtaining leave from the court to cross-examine the witness at large.

Two cautions are necessary. First, the law governing the procedure to follow when a party is seeking to contradict or cross-examine its own witness is complex, confusing, and to a certain extent conflicting. Second, there are significant differences in wording between s. 23 of the Ontario **Evidence Act** and s. 9 of the **Canada Evidence Act** R.S.C. 1985, c. C-5, which have led to differences in judicial interpretation. Decisions under the **Canada Evidence Act** must be used cautiously when interpreting the Ontario section.

### Refreshing Memory

An honest but forgetful witness may be shown a prior statement made by him in order to refresh his memory.

R. v. Coffin, [1956] S.C.R. 191, 114 C.C.C. 1

On an application under s. 23, a trial judge has a discretion to direct that a witness be given an opportunity to refresh his memory from the prior statement before ruling that the witness may be cross-examined on the statement.

Stewart v. R. (1976), 31 C.C.C. (2d) 497 (S.C.C.)

However, where the position of the party calling the witness is that the witness is not honestly forgetful but is adverse, the trial judge should not require the party to give the witness an opportunity to refresh his memory from the statement.

R. v. Booth (1984), 15 C.C.C. (3d) 237 (B.C.C.A.)

## **Ontario Evidence Act, s. 23**

This section requires a finding that the witness is "adverse". It allows the party who called the witness to cross-examine that witness on a previous statement inconsistent with the evidence given by the witness at trial. It does *not* entitle the party to cross-examine the witness at large.

Some issues arising out of the section, and a suggested procedure to follow under s. 23, are discussed in the following sections.

### **Meaning of "Adverse"**

There are a number of cases that discuss whether "adverse" in s. 9 of the **Canada Evidence Act** means that the witness need only be "adverse in interest", or must be actively "hostile" in demeanour. Whatever the correct position under that statute, it is clear that under the **Ontario Evidence Act** the word "adverse" means "opposed in interest or position". A witness may be adverse where his evidence runs contrary to the facts that the party calling him seeks to establish. It does not require any showing of overt or covert hostility toward the party calling him.

The word "adverse" is a more comprehensive expression than "hostile". It includes the concept of hostility of mind, but also includes what may be merely opposed in interest or unfavourable in the sense of opposite in position....[Section 23] embraces inconsistent prior statements made by a hostile witness, and by one who though not hostile is unfavourable in the sense of assuming by his testimony a position opposite to that of the party calling him.

*Wawanesa Mutual Insurance Co. v. Hanes*, [1961] O.R. 495 (C.A.), per Porter C.J.O. at 505, 507; cf. *MacKay J.A.* at 529. (rev'd on other grounds)

*Boland v. Globe & Mail Ltd.*, [1961] O.R. 712 (C.A.)

### **Meaning of "Inconsistent"**

A statement by the witness in evidence that he does not recall events about which he gave a statement on an earlier occasion may be "inconsistent" within the meaning of the section, at least when there is some question as to the truth of the claim of forgetfulness.

*McInroy and Rouse v. R.* (1978), 42 C.C.C. (2d) 481 (S.C.C.)

*R. v. Gushue* (No. 4) (1975), 30 C.R.N.S. 178 (Ont. Co. Ct.)

It seems that a claim by a witness not to recall the events can be assessed for its likelihood in light of the nature of the events. For example, a witness is unlikely to completely forget witnessing a murder.

*R. v. Gushue* (No. 4) (1978), 42 C.C.C. (2d) 481 (S.C.C.)

### Method of Proving Adversity

The existence of a previous inconsistent statement may be considered as evidence of adversity by the trial judge. The trial judge is not limited to considering the demeanour and manner of the witness.

Wawanesa Mutual Insurance Co. v. Hanes, [1961] O.R. 495 (Ont. C.A.)

R. v. Cassibo (1982), 70 C.C.C. (2d) 498 (Ont. C.A.)

### Oral or Written Statements

The section applies equally to oral or written statements. There is no requirement in the Ontario **Evidence Act**, as there is in s. 9(2) of the **Canada Evidence Act**, that the statement be "in writing or reduced to writing".

Wawanesa Mutual Insurance Co. v. Hanes, [1961] O.R. 495 (Ont. C.A.)

R. v. Cassibo (1982), 70 C.C.C. (2d) 498 (Ont. C.A.)

R. v. Carpenter (1982), 1 C.C.C. (3d) 149 (Ont. C.A.)

A statement given orally to a police officer and subsequently noted down by the officer may be used as a prior inconsistent statement under this section. The witness need not review or sign the statement.

R. v. Carpenter (1982), 1 C.C.C. (3d) 149 (Ont. C.A.)

### Proof of Prior Inconsistent Statement

It was formerly thought that the party producing the statement need only adduce *prima facie* proof that the statement was made (presumably, evidence that if believed and uncontradicted would establish that the statement was made).

R. v. Boyce and Meade (unreported, Ont. Co. Ct., May 31, 1974)

It now appears that the judge must be "satisfied" that the statement was made before it can form the foundation for a declaration of adversity. While it is not entirely clear what this means, it would seem to require proof on a balance of probabilities.

R. v. Williams (1985), 18 C.C.C. (3d) 356 (Ont. C.A.), leave to appeal to S.C.C. refused  
*ibid*

This burden is equally applicable whether the witness sought to be declared adverse is a Crown or defence witness.

R. v. Williams (1985), 18 C.C.C. (3d) 356 (Ont. C.A.), leave to appeal to S.C.C. refused  
*ibid*

### **Residual Discretion of Judge**

The trial judge has a residual discretion as to whether to declare the witness adverse and whether to permit cross examination on the statement. Cross examination on the statement should only be allowed where it is in the interests of justice to do so. Factors to be considered in making this determination include:

- (a) whether the witness admits making the statement;
- (b) the quality of the evidence supporting the allegation that the statement was made;
- (c) the degree of inconsistency between the statement and the witness' testimony;
- (d) whether the statement will give rise to a multiplicity of issues or otherwise prejudice a fair trial;
- (e) whether the words spoken were ambiguous.

Wawanesa Mutual Insurance Co. v. Hanes, [1961] O.R. 495 (Ont. C.A.)

R. v. Cassibo (1982), 70 C.C.C. (2d) 498 (Ont. C.A.)

### **Effect of Prior Inconsistent Statement**

A prior inconsistent statement is not evidence of the facts it contains, except to the extent that those facts are adopted by the witness at trial. If the witness does not adopt the statement, then the statement is only relevant to the credibility of the evidence given by the witness at trial.

Deacon v. R. (1947), 89 C.C.C. 1 (S.C.C.)

Wawanesa Mutual Insurance Co. v. Hanes, [1961] O.R. 495 (Ont. C.A.)

R. v. Gwozdowski (1972), 10 C.C.C. (2d) 434 (Ont. C.A.)

### **Right to Cross-Examine under s. 23**

Once a party has been given leave to adduce a prior inconsistent statement under s. 23, he is only entitled to cross-examine the witness on that statement. A declaration of adversity under s. 23 does not entitle a party to cross-examine at large.

Wawanesa Mutual Insurance Co. v. Hanes, [1961] O.R. 495 (Ont. C.A.)

### **Use of s. 23 on Re-Examination**

A party is entitled to use s. 23 to put a prior inconsistent statement to his own witness in re-examination if testimony inconsistent with the prior statement was given in cross-examination. This is the case even if counsel can reasonably anticipate that



cross-examination on an area not covered in examination-in-chief will be inconsistent with a prior statement. There is a duty for counsel to canvass the subject matter of the statement in examination-in-chief.

R. v. Cassibo (1982), 70 C.C.C. (2d) 498 (Ont. C.A.)

R. v. Moore (1984), 15 C.C.C. (3d) 541 (Ont. C.A.)

### **Procedure for Use of s. 23**

The following procedure is suggested when counsel wishes to cross-examine a witness on a prior inconsistent statement under s. 23.

1. Consider the advantages and disadvantages of having the witness declared adverse. Decide whether the aim is simply to contradict the evidence of a witness on a certain point, or to make the witness adopt the previous statement. Consider the likelihood of success, the effect on the overall credibility of the witness of using the s. 23 procedure, the relative importance of the point, and the degree and nature of the supposed inconsistency. Consider also if the witness should be given an opportunity to refresh his memory from the statement prior to using s. 23.
2. Advise the court that an application under s. 23 is being made and request that a voir dire be commenced.
3. Provide the court with a copy of the alleged inconsistent statement. For obvious tactical reasons, it is preferable if the court and opposing counsel is given a written copy, rather than having the statement read out loud.
4. If required by the court, give the witness an opportunity to refresh his memory from the statement.
5. Ask the witness if he recalls being at a certain place on a certain date and making a statement. The witness must be given the opportunity of admitting or denying making the statement, and if he admits making it, the opportunity of explaining the circumstances in which it was made.
6. If the witness denies making the statement, call other witnesses (generally police officers) to prove that it was made.
7. Ensure that opposing counsel is given the opportunity to cross-examine all witnesses on the voir dire (although it may be of no advantage for counsel to do so).
8. If the court asks for submissions on the voir dire, point out inconsistencies between the statement and the testimony as well as any other factors supporting a finding of adversity.



9. Ensure that the court rules specifically on the issue of adversity and acknowledges the right to cross-examine on the statement.

### **Cross-Examination of Hostile Witness**

A judge has a general discretion at common law to permit a party to cross-examine its own witness where that witness proves hostile in his demeanour, general attitude, and substance of his evidence. This common law discretion is separate from, and unaffected by, s. 23 of the **Evidence Act**.

Wawanesa Mutual Insurance Co. v. Hanes, [1961] O.R. 495 (C.A.)

R. v. Cassibo (1982), 70 C.C.C. (2d) 498 (Ont. C.A.)

See "Cross-Examination", *infra*

## ALIBI

### Introduction

The defence of alibi arises where the defendant leads evidence that he could not have been the perpetrator because he was somewhere else when the offence was committed. It is not a special plea but is raised as part of a plea of not guilty.

### Alibi And Other Defences

A defendant may advance an alibi defence together with other defences, although for obvious reasons alibi is usually advanced as the sole defence (coupled, of course, with an attack on the Crown's evidence of identification). For examples of "defences in double harness", see, for example:

R. v. Mahoney (1979), 50 C.C.C. (2d) 380 (Ont. C.A.)—alibi and intoxication

R. v. Morin (1987), 36 C.C.C. (3d) 50 (Ont. C.A.), aff'd (1988), 44 C.C.C. (3d) 193 (S.C.C.)—alibi and insanity

### Disclosure Of Alibi

The rules governing the disclosure of an alibi are not statutory, but have developed at common law. There is no obligation on a defendant to disclose an alibi at the earliest possible opportunity. However, failure to disclose the alibi at a sufficiently early time to permit it to be investigated by the police is a factor in determining the weight to be given to the alibi evidence.

R. v. Mahoney (1979), 50 C.C.C. (2d) 380 (Ont. C.A.), aff'd (1982), 67 C.C.C. (2d) 197 (S.C.C.)

R. v. Dunbar and Logan (1982), 68 C.C.C. (2d) 13 (Ont. C.A.)

R. v. Speid (1988), 42 C.C.C. (3d) 12 (Ont. C.A.)

R. v. Shortreed (1990), 54 C.C.C. (3d) 292 (Ont. C.A.)

Generally, where there is adequate time for investigation, the time of disclosure of the alibi is not a matter for consideration.

R. v. Parrington (1985), 20 C.C.C. (3d) 184 (Ont. C.A.)

However, delay in disclosing an alibi until the time of trial, or shortly before the time of trial, can be considered by the trier of fact assessing the weight to be given to the alibi, even if an earlier investigation would likely have proved inconclusive.

R. v. Shortreed (1990), 54 C.C.C. (3d) 292 (Ont. C.A.)

### Order Of Alibi Evidence

It has been held that where the only defence is alibi, the defendant should be the first defence witness.

R. v. Archer (1974), 26 C.R.N.S. 225 (Ont. C.A.)

However, another line of cases holds that the trial judge has no power to direct the order of defence witnesses, even where the defence is alibi.

R. v. Angelantoni (1975), 28 C.C.C. (2d) 179 (Ont. C.A.)

R. v. Sparre (1977), 37 C.C.C. (2d) 495 (Ont. G.S.P.)

The current state of the law on this point is uncertain.

See A.G. Campbell "Annotation: The Order of Defence Witnesses" (1974), 26 C.R.N.S. 227

If the defendant testifies after other witnesses in support of the alibi, the Crown in its closing submissions should point out that this allows the defendant to tailor his evidence to conform with the evidence of the other witnesses.

### Failure Of Defendant To Testify

Failure of a defendant who is advancing the defence of alibi to testify under oath is relevant and important when the weight to be given to the alibi is considered.

Vezeau v. R. (1976), 28 C.C.C. (2d) 81 (S.C.C.)

A defendant who does not testify himself as to his alibi cannot expect an appellate court to consider rejection of the alibi as a serious ground of appeal.

Catellier v. R. (1948), 93 C.C.C. 394 (Que. Ct. of K.B., Appeal Side)

R. v. Hutton (1953), 105 C.C.C. 189 (B.C.S.C.)

R. v. Howarth (1971), 1 C.C.C. (2d) 546 (Ont. C.A.)

### Reply Evidence

The Crown may call reply evidence to rebut an alibi, even if the reply evidence also serves to confirm the Crown's case in chief.

R. v. Therien and Sanseverino (1943), 80 C.C.C. 87 (B.C.C.A.)

The Crown is not obliged to call evidence contradicting an alibi as part of its case in chief, even if notice of the alibi has previously been given. Evidence that the defendant was not present at the location alleged in the alibi is not relevant as a matter of law until there is some evidence that he was at the location of the alibi at the time of the offence. Accordingly, evidence that is relevant only to disprove an alibi can properly be called in rebuttal, even though the Crown knows the alibi evidence will be coming.

R. v. Rafferty (1984), 6 C.C.C. (3d) 72 (Alta. C.A.)

### **Consideration Of Alibi As A Defence**

Alibi, like most other defences, should not be considered separately before approaching the rest of the case. The trier of fact should not first determine the alibi evidence in a vacuum apart from all the other evidence.

Steinberg v. R. (1931), 56 C.C.C. 9 (S.C.C.)

However, the evidence given in support of the alibi should be delineated for a jury (and presumably, in a non-jury trial, should be delineated by the trier of fact when giving reasons for rejecting the alibi.)

Lizotte v. R. (1950), 99 C.C.C. 113 (S.C.C.)

### **Degree Of Proof**

A defendant need not prove an alibi beyond a reasonable doubt nor even to the satisfaction of the court. If the evidence of alibi, even if not accepted, raises a reasonable doubt as to guilt, the defendant must be acquitted.

R. v. Talbot (1944), 83 C.C.C. 41 (Ont. C.A.)

Lizotte v. R. (1950), 99 C.C.C. 113 (S.C.C.)

An alibi cannot be viewed in isolation. Even where evidence of alibi does not by itself raise a reasonable doubt, the defendant is entitled to an acquittal where on the evidence as a whole there is a reasonable doubt as to guilt.

### **Inferences From An Alibi Which Is Not Accepted**

There is a difference in effect between an alibi which is simply not believed and an alibi which is proven to be fabricated and false. If the court simply does not believe the defendant's alibi, then no inference of consciousness of guilt can be drawn. The court must consider all the other evidence of guilt, without drawing any inference from the rejected alibi evidence.

R. v. Davison et al. (1974), 20 C.C.C. (2d) 424 (Ont. C.A.)

R. v. Mahoney (1979), 50 C.C.C. (2d) 380 (Ont. C.A.), aff'd (1982), 67 C.C.C. (2d) 197 (S.C.C.)

R. v. Tzimpoulos (1986), 29 C.C.C. (3d) 304 (Ont. C.A.)

However, if the court concludes that the alibi is fabricated, that fabrication is evidence that can be considered along with all the other evidence to support a finding that the defendant was the perpetrator. In effect, an inference of consciousness of guilt may be drawn from the fabrication of an alibi.

R. v. Davison et al. (1974), 20 C.C.C. (2d) 424 (Ont. C.A.)

R. v. Mahoney (1979), 50 C.C.C. (2d) 380 (Ont. C.A.), aff'd (1982), 67 C.C.C. (2d) 197 (S.C.C.)

R. v. Tzimpoulos (1986), 29 C.C.C. (3d) 304 (Ont. C.A.)

R. v. Dunn (1990), 56 C.C.C. (3d) 538 (B.C.C.A.)

### **Contradictory Alibi Statements**

Contradictory statements by a defendant about his whereabouts at the time of the offence may constitute evidence that one or more of the statements were fabricated.

R. v. Andrade (1985), 18 C.C.C. (3d) 41 (Ont. C.A.)

### **Attacking an Alibi Defence**

#### Before Trial

1. Anticipate this defence if the identity of the perpetrator is the sole contested issue.
2. Once the particulars of the alibi are known, have the police investigate all the evidence as to the whereabouts of the defendant and the alibi witnesses at the material time. Inquire into the background of each alibi witness, his relationship to the defendant, any inconsistent statements that the witness made and all other circumstances which may be helpful in cross-examination, (e.g., the weather at the time and place of the alleged alibi). If the defendant is in custody, obtain a list of his visitors.

#### At Trial

1. Request an order excluding witnesses.
2. Cross-examine each alibi witness to determine some or all of the following matters:
  - (a) When the witness first learned the defendant was charged.



- (b) When the witness first learned the offence date and from whom.
- (c) When the witness first realized that he could testify as to the alibi.
- (d) What he did as a result of learning that he could exculpate the defendant.
- (e) Whether he contacted the police to advise them of his knowledge of the whereabouts of the defendant.
- (f) Whether he gave a statement orally or in writing to anyone.
- (g) Whether he visited the defendant in or out of custody.
- (h) What is his relationship to the defendant, e.g., friend, relative, debtor, business associate, etc.
- (i) Whether he discussed his evidence with the defendant or with other alibi witnesses.

Witnesses to a fabricated alibi generally have their stories on the central events learned well. Often, however, contradictions on matters of surrounding detail can be developed, as well as contradictions on events before and after the central events. Exploring what meetings the alibi witness has had with the defendant and other alibi witnesses is often fruitful.

3. Test each witness carefully on his ability to recall events on dates other than the offence date. If the witness is able to be precise about the day of the alleged alibi, but is very vague about other days, this will damage his credibility. This is a particularly useful technique if the alibi witness had no good reason to have the day of the alleged alibi fixed in his mind (for example, where the defendant is not charged until much later, or the alibi witness does not learn about the charge until much later).





## BURDEN OF PROOF

### Introduction

In every prosecution the Crown must prove that an offence was committed and that the defendant committed it. The Crown may also have to prove that the defendant acted with some mental state required for the offence (in *mens rea* offences). The defence may try to challenge the evidence led by the Crown, and may also lead evidence of its own.

The concept of burden of proof relates the evidence to the elements of the offence and any applicable defences. It involves two separate questions: (i) on whom does the burden of adducing evidence on a particular issue lie and (ii) what is the standard of evidence that a party must lead to succeed on that issue.

### Evidential Burden

A party may bear the burden of adducing some evidence on an issue, either to make it a live issue at the trial (for example, where the defendant wishes to raise a general defence such as necessity) or to rebut a presumption operating against the party by statute or common law. This is referred to as the "evidential burden", "tactical burden", or "initial burden". The phrase "evidential burden" captures the simple idea that there must be some evidence before the court on an issue before the court will consider that issue. As a matter of common sense, it follows that the evidential burden falls on the party wishing to have the issue considered by the court.

Latour v. R. (1950), 98 C.C.C. 258 (S.C.C.)

R. v. Robertson (1987), 33 C.C.C. (3d) 481 (S.C.C.)

R. v. Schwartz (1988), 45 C.C.C. (3d) 97 at 115 (S.C.C.) per Dickson C.J.C.  
dissenting on other grounds

See "Exceptions and Presumptions", *infra*

The "burden of adducing evidence" does not mean that the evidence has to be led by the party having the burden. The evidential burden is satisfied so long as there is evidence sufficient to raise the issue before the court; it does not matter whether the evidence comes in examination in chief or cross-examination, or whether it comes from Crown or defence witnesses. For example, the Crown may tender a statement of the defendant as part of its case that contains evidence sufficient to raise a defence of necessity. The Crown would then have to satisfy the burden of persuasion of disproving that defence.

## Burden of Persuasion

After all the evidence has been led, the court must consider the burden of persuasion with respect to each of the propositions at issue. This burden (also referred to as the "legal burden", "ultimate burden" or "persuasive burden") refers to the burden the party must meet to have the issue resolved in its favour. Like all burdens, it involves two questions: (i) on whom does the burden lie? (ii) what is the standard the party's evidence must meet?

In criminal matters, there are two standards of proof that may apply to the legal burden: proof "on a balance of probabilities" and proof "beyond a reasonable doubt".

Proof "on a balance of probabilities" is also referred to as "a preponderance of evidence", "the civil standard" (since it is the normal standard applied in civil cases), "more likely than not", and "the 51% rule". A party's evidence fails to meet this standard where the court finds that the other party's evidence is more persuasive, or where the evidence is equally persuasive on either side.

R. v. Collins (1987), 33 C.C.C. (3d) 1 (S.C.C.)

The meaning of proof beyond a reasonable doubt is discussed in "Reasonable Doubt", *infra*.

As a general principle, the burden of persuasion in a criminal trial lies on the Crown to prove all elements of the offence, and to disprove any defences for which the defence has met the evidential burden, beyond a reasonable doubt.

Latour v. R. (1950), 98 C.C.C. 258 (S.C.C.)

R. v. Robertson (1987), 33 C.C.C. (3d) 481 (S.C.C.)

R. v. Schwartz (1988), 45 C.C.C. (3d) 97 at 115 (S.C.C.) per Dickson C.J.C. dissenting on other grounds

There are certain circumstances, however, where the defence may bear the burden of persuasion. For discussions of the burdens of proof applicable to specific defences, see "Defences: General", "Strict and Absolute Liability" and discussions of individual defences in **General Principles and Defences**, *supra*. For a discussion of the burden of proof applicable to different forms of statutory exemptions and presumptions, see "Exemptions and Presumptions", *infra*.

## Provincial Offences

The burden of proof on the Crown in provincial offences is the same as the burden in criminal matters. Generally, the Crown must prove all elements of the offence beyond a reasonable doubt.

R. v. Beauchamp (1953), 16 C.R. 270 (Ont. C.A.)

R. v. City of Sault Ste. Marie (1977), 40 C.C.C. (2d) 353 (S.C.C.)

This standard of proof remains the same where the defendant does not appear and trial proceeds *ex parte* under s. 54 of the **Provincial Offences Act**. The defendant does not, by non-attendance, forfeit the right to be convicted only upon proof beyond a reasonable doubt of all elements of the offence.

R. v. Bandito Video Ltd. (1986), 52 C.R. (3d) 293 (Ont. Prov. Ct.)

## Charter of Rights

Where the defence alleges a violation of a **Charter** right, both the evidential burden and the burden of persuasion lie on the defence. The standard on the burden of persuasion is the balance of probabilities. Unless the defendant establishes, on a balance of probabilities, facts that demonstrate that a **Charter** right has been infringed, the court will not conclude that there has been any such violation.

R. v. Collins (1987), 33 C.C.C. (3d) 1 (S.C.C.)

R. v. Kutynec (1992), 70 C.C.C. (3d) 1 (Ont. C.A.)

This onus may be shifted by a presumption. For example, there is a presumption under s. 8 of the **Charter** that a warrantless search is unreasonable. Once the evidence establishes that a warrantless search has taken place, the burden will shift to the Crown to establish that the search was reasonable.

Hunter v. Southam (1984), 14 C.C.C. (3d) 97 (S.C.C.)

R. v. Collins (1987), 33 C.C.C. (3d) 1 (S.C.C.)

If the defence establishes a breach of a **Charter** right and the remedy it seeks is the exclusion of evidence under s. 24(2), the burden lies on the defence to establish that the admission of the evidence could bring the administration of justice into disrepute. The standard is again the civil standard of the balance of probabilities.

R. v. Collins (1987), 33 C.C.C. (3d) 1 (S.C.C.)

### Burden of Proof for Defences

The burden of proof where the defence raises a general defence (such as necessity) is discussed in "Defences: General Principles", in **General Principles and Defences**, *supra*, and under specific defences in that section.

The burden of proof where the defence raises the special defences of due diligence or honest and reasonable mistake of fact is discussed in "Strict and Absolute Liability", in **General Principles and Defences**, *supra*.

The burden of proof where the defence seeks a stay of proceedings as a remedy for abuse of process is discussed in "Abuse of Process" in **General Principles and Defences**, *supra*.



## CIRCUMSTANTIAL EVIDENCE

### Introduction

Direct evidence is evidence from a witness who personally perceived the matter in issue. Circumstantial evidence, on the other hand, is evidence from a witness who did not personally perceive the matter in issue, but who did personally perceive some matter that allows the court to draw some inference about a matter in issue.

When assessing direct evidence, the court need only concern itself with the weight to be given to the evidence. With circumstantial evidence, the court must also consider how strongly the evidence supports the inference that the court is asked to draw.

Since the recent abolition of the so-called "rule in Hodge's case", the difference between direct and circumstantial evidence is much less significant than it used to be.

### Admissibility of Circumstantial Evidence

As long as a piece of circumstantial evidence is, as a matter of logic and common sense relevant, it is admissible (unless, of course, it excluded by some other rule of evidence). There is no "minimum standard of probative weight" that circumstantial evidence must meet before it is admissible.

An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. It need not even make that proposition appear more probable than not. Whether the entire body of one party's evidence is sufficient to go to the jury is one question. Whether a particular item of evidence is relevant to his case is quite another. It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence. Even after the probative force of the evidence is spent, the proposition for which it is offered can still appear quite improbable. Thus, the common objection that the inference for which the fact is offered "does not necessarily follow" is untenable. It poses a standard of conclusiveness that very few single items of circumstantial evidence could ever meet. A brick is not a wall.

*McCormick on Evidence*, 3rd. ed. (1984), at p. 542, quoted with approval in *R. v. Young* (unreported, Ont. Gen. Div., Feb. 12, 1991, per Moldaver J.)

See generally "Relevance", *infra*



## Probative Weight

There is no rule of law that circumstantial evidence intrinsically carries less weight than direct evidence. The trier of fact must simply assess all the evidence in a particular case, whether direct or circumstantial, to determine whether the Crown has met its burden of proof.

It is not an error for the trial Judge to tell a jury that often circumstantial evidence is much more conclusive than positive testimony. Witnesses may distort their testimony, may give false testimony. The testimony of one witness may contradict that of another. Circumstances, on the other hand, are rarely distorted, and a well linked chain of circumstantial evidence often points to the innocence or the guilt of an accused much clearer than any testimony.

R. v. Riopel (1922), 39 C.C.C. 148 (Que C.A.) at 155-156 per Greenshields J.

I recognize fully that guilt can be brought home to an accused by circumstantial evidence; that there are cases where the circumstances can be said to point inexorably to guilt more reliably than direct evidence; that direct evidence is subject to the everyday hazards of imperfect recognition or of imperfect memory or both. The circumstantial evidence case is built piece by piece until the final evidentiary structure completely entraps the prisoner in a situation from which he cannot escape. There may be missing from that structure a piece here or there and certain imperfections may be discernible, but the entrapping mesh taken as a whole must be continuous and consistent. The law does not require that the guilt of an accused be established to a demonstration but is satisfied where the evidence presented to the jury points conclusively to the accused as the perpetrator of the crime and excludes any reasonable hypothesis of innocence. The rules of evidence apply with equal force to proof by circumstantial evidence as to proof by direct evidence. The evidence in both cases must be equally credible, admissible and relevant.

Reference Re R. v. Truscott, [1967] 2 C.C.C. 285, 1 C.R.N.S. 1 (S.C.C.) per Hall J.A. dissenting on other grounds

R. v. Kaysaywaysemat (1992), 10 C.R. (4th) 317 (Sask. C.A.)

## Rule In Hodge's Case

It was previously thought that where the case for the Crown was wholly or largely circumstantial, the jury had to be directed in accordance with the "rule in Hodge's Case". This involved a direction that not only must the jury be satisfied that the circumstances were consistent with the defendant having committed the act, but they also had to be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the defendant was the guilty person.

Hodge's Case, [1838] 2 Lewin 227, 168 E.R. 1136 (Q.B.)

Over time, there was considerable debate over what issues in the case the "rule" applied to, at what stage of the proceedings the rule applied, and how the rule related to the normal standard of proof beyond a reasonable doubt.

G.A. Miller "Circumstantial Evidence" [1992] 1 Crown's Newsletter 29

It is now clear that the "rule" is simply an application of the standard of proof beyond a reasonable doubt in the particular context of circumstantial evidence. It merely serves as a graphic way of illustrating that principle to the jury. The requirement in all cases, whether direct or circumstantial, is that the trier of fact must be satisfied beyond a reasonable doubt that the guilt of the defendant is the only reasonable inference to be drawn from the evidence.

R. v. Mitchell, [1964] S.C.R. 471, [1965] 1 C.C.C. 155

R. v. Cooper (1977), 34 C.C.C. (2d) 18 (S.C.C.)

R. v. Elmosri (1985), 23 C.C.C. (3d) 503 (Ont. C.A.)

Nevertheless, some courts erroneously continue to refer to the rule (or "so-called rule") in dealing with circumstantial evidence.



## CROSS-EXAMINATION

### Introduction

Cross-examination has two purposes: to elicit additional evidence favourable to the cross-examiner; and to weaken, qualify, show the unlikelihood of, or totally negate evidence unfavourable to the cross-examiner. The second of these two purposes is usually accomplished by impugning the perception, memory, ability to describe, bias, or honesty of the witness being cross-examined.

### Provincial Offences Act

See sections 46(2) and 46(3).

### Scope of Cross-Examination

Counsel may cross-examine a witness on any matter relevant to the proceeding before the court. Unlike the United States, counsel is not limited to cross-examining on matters that were covered in the examination in chief.

### Ordinary Rules of Evidence Apply

The ordinary rules governing admissibility of evidence apply during cross-examination. Hearsay evidence, unless an exception to the hearsay rule exists, is as inadmissible in cross-examination as it is in examination-in-chief.

R. v. Lavery (No. 2) (1979), 47 C.C.C. (2d) 60 (Ont. C.A.)

### Judicial Interference

A trial judge should allow full cross-examination as long as it is material to an issue or touches the credibility of a witness. The court may exclude irrelevant, insulting or repetitious cross-examination.

R. v. Anderson (1938), 70 C.C.C. 275 (Man. C.A.)

Cormier v. R. (1974), 25 C.R.N.S. 94 (Que. C.A.)

A trial judge should not interfere in cross-examination except in cases of clear and patent abuse.

R. v. Pepin (1974), 20 C.C.C. (2d) 531 (Que. S.C.)

A trial judge may disallow cross-examination which invites hearsay responses or which harasses the witnesses, but may not set a time limit during which cross-examination must be completed.

R. v. Bradbury (1973), 23 C.R.N.S. 293, 14 C.C.C. (2d) 139 (Ont. C.A.)

A trial judge should not engage in conversations with a witness that are not understood by a defendant's counsel. He should not act as an interpreter for any witness.

Turkiewicz et al. v. R. (1979), 10 C.R. (3d) 352 (Ont. C.A.)

A trial judge who constantly interrupts counsel, or who makes denigrating comments about a defendant or his counsel, does not allow for the necessary appearance of a fair trial.

Turkiewicz et al. v. R., (1979), 10 C.R. (3d) 352 (Ont. C.A.)

At the completion of cross-examination, a trial judge may not rehabilitate a witness in a manner that would be impermissible for the party who had called the witness. This does not, however, prevent a judge from asking questions to clear up confusion or deal with matters that have been overlooked.

R. v. Canton (1989), 51 C.C.C. (3d) 415 (Ont. C.A.)

While a trial judge may assist a defendant who is not represented by counsel, he may not go so far as to cross-examine Crown witnesses in the way that defence counsel would.

R. v. Turlon (1989), 49 C.C.C. (3d) 186 (Ont. C.A.)

### **Who May Cross-Examine**

A defendant may cross-examine any witness called against him, even if the Crown has been granted leave to cross-examine the witness during examination-in-chief.

R. v. Cooper, [1970] 2 O.R. 54 (C.A.)

A defendant has an absolute right to cross-examine a co-defendant who testifies at their joint trial, irrespective of whether the evidence is favourable or unfavourable to him.

R. v. McLaughlin (1974), 15 C.C.C. (2d) 562 (Ont. C.A.)



A defendant also has an absolute right to cross-examine any witnesses called by a co-defendant.

R. v. Jewell (1974), 22 C.C.C. (2d) 252 (Ont. C.A.)

### Sequence of Cross-Examinations

Defence counsel should cross-examine witnesses, including co-defendants who testify, in the order of the names on the information unless otherwise agreed by the defence counsel or directed by the trial judge, who may consider the respective degrees of criminality and the seniority of counsel.

R. v. Barsalou (No. 3) (1901), 4 C.C.C. 446 (Que. K.B.)

Counsel for other defendants must cross-examine before Crown counsel.

R. v. Barsalou (No. 3) (1901), 4 C.C.C. 446 (Que. K.B.)

R. v. Jewell (1974), 28 C.R.N.S. 331 (Ont. C.A.)

A trial judge has a discretion to permit recross-examination by counsel for other defendants following cross-examination by Crown counsel. This discretion will not be exercised where counsel seeking to recross-examine could reasonably have anticipated the matters developed by Crown counsel.

R. v. Rochester (1984), 13 C.C.C. (3d) 215 (Ont. Dist. Ct.)

### Cross-Examination on Prior Inconsistent Statement

One of the most effective ways of impeaching the credibility of a witness is to show that his testimony is inconsistent with a statement made on a prior occasion. Such an impeachment not only affects the credibility of the witness on the particular point of contradiction, but can also cast doubt on the overall credibility of the witness. Properly done, it can also be a severe psychological blow to the witness, shaking his confidence and causing him to be much more cautious in giving the rest of his evidence.

See John Pearson "Prior Inconsistent Statements" in Law Society of Upper Canada, *Evidence in Criminal Cases* (L.S.U.C., Toronto, 1989) at E-1

The right to cross-examine on a prior inconsistent statement exists at common law. The Ontario **Evidence Act**, however, sets out some procedures to follow in using such statements and permits the independent proof, in some circumstances, of the statements.

Evidence Act, ss. 20, 21

Cf. Canada Evidence Act, R.S.C. 1985, c. C-5, ss. 10, 11



It has been argued persuasively that, while s. 20 applies to written statements, s. 21 applies to both written and oral statements (despite the marginal description). Even if this view is not accepted, the effect of s. 20 is to make the procedure for both written and oral statements largely similar.

A.W. Bryant "The Adversary's Witness: Cross-Examination and Proof of Prior Inconsistent Statements" (1984), 62 Can. B. Rev. 43

A statement "in writing or reduced to writing" includes a document written by a witness or a transcript of evidence given by him in a judicial proceeding, as well as an affidavit or statement under oath.

Deacon v. R., [1947] S.C.R. 531

Modriski v. Arnold, [1947] O.W.N. 483 (C.A.)

R. v. Campbell (1977), 38 C.C.C. (2d) 6 (Ont. C.A.)

It includes a conversation with a witness noted down verbatim at the time by a police officer (even where the conversation took place in French but the notes were made in English). However, it does not include notes by a police officer made wholly or in part at a later time based on the police officer's recollection.

R. v. Carpenter (No. 2) (1982), 1 C.C.C. (3d) 149 (Ont. C.A.)

R. v. Cassibo (1982), 70 C.C.C. (2d) 498 (Ont. C.A.)

R. v. Handy (1978), 45 C.C.C. (2d) 232 (B.C.C.A.)

It is not necessary that the statement be reviewed, acknowledged or signed by the witness at the time it was made in order to be a "statement reduced to writing" within the meaning of this section.

R. v. Carpenter (No. 2) (1982), 1 C.C.C. (3d) 149 (Ont. C.A.)

It has been suggested that the appropriate test is whether the statement was reduced to writing in circumstances "giving assurance of accuracy" or giving "some guarantee of completeness, authenticity, or contemporaneity".

S. Schiff "The Previous Inconsistent Statement of Opponent's Witness" (1986), 36 U.T.L.J. 440

A.W. Bryant "The Adversary's Witness: Cross-Examination and Proof of Prior Inconsistent Statements" (1984), 62 Can. B. Rev. 43

The trial judge need not determine that a statement is inconsistent before cross-examination may take place on it. It is only where a party seeks to prove the statement by independent evidence that inconsistency must be shown.

Cormier v. R. (1973), 25 C.R.N.S. 94 (Que. C.A.)

R. v. Savion and Mizrahi (1980), 52 C.C.C. (2d) 276 (Ont. C.A.)

Under s. 20, it is not necessary that the written statement be shown to the witness before or at the time he is being contradicted by it. However, his attention must be drawn to the parts of the writing that are to be used for the purpose of contradicting him.

R. v. Valley (1986), 26 C.C.C. (3d) 207 (Ont. C.A.)

Section 20 gives the court power to order production of the statement and to make what use of the statement he sees fit. It can be argued by analogy with s. 23 that, where the position of the cross-examiner is that the witness is other than honest but forgetful, the court should not exercise its discretion to permit the witness to review the statement and refresh his memory from it (at least until cross-examination on it is complete).

R. v. Booth (1984), 15 C.C.C. (3d) 237 (B.C.C.A.)

Where a party seeks to lead evidence under s. 21, the circumstances of the making of prior statement *must* be put to the witness during cross-examination. The circumstances should include the time and place the statement was made and the person to whom it was made. Where this is not done, the trial judge may refuse to permit subsequent proof of the prior inconsistent statement.

R. v. Grant (1989), 49 C.C.C. (3d) 410 (Man. C.A.)

A statement by a witness in evidence that they do not recall the events that they gave a statement about on an earlier occasion may be "inconsistent" with that statement within the meaning of ss. 20 and 21, at least where there is some question as to the truth of claim of forgetfulness at trial.

McInroy and Rouse v. R. (1978), 42 C.C.C. (2d) 481 (S.C.C.)

R. v. Gushue (No. 4) (1915), 30 C.R.N.S. 178 (Ont. Co. Ct.)

It appears that a claim by a witness that he does not recall the matters on which the statement was given can be tested for its truthfulness in light of the nature of the events. For example, a witness is not likely to forget totally a traumatic event such as a major car accident or a murder.

A prior inconsistent statement is hearsay and is not evidence of the facts it contains, except to the extent that it is adopted by the witness at trial. If the witness does not adopt the statement, then it can only be considered for the purpose of determining credibility.

Deacon v. R. (1947), 89 C.C.C. 1 (S.C.C.)

Wawanesa Mutual Insurance Co. v. Hanes, [1961] O.R. 495 (Ont. C.A.)

R. v. Gwozdowski (1972), 10 C.C.C. (2d) 434 (Ont. C.A.)

R. v. Hobart (1982), 65 C.C.C. (2d) 518, 25 C.R. (3d) 214 (Ont. C.A.)

R. v. Bevan (1991), 63 C.C.C. (3d) 333 (Ont. C.A.)

Where a defendant testifies in his own defence, he may be cross-examined by a co-defendant on any prior inconsistent statement given by him to a person in authority. It is not necessary to prove that the statement was voluntary or that the defendant was advised of his rights under s. 10(b) of the **Charter**.

R. v. Ma, Ho, and Li (1978), 44 C.C.C. (2d) 537, 6 C.R. (3d) 325 (B.C.C.A.)

R. v. Young (1981), 64 C.C.C. (2d) 13 (B.C.C.A.)

R. v. Pelletier (1986), 29 C.C.C. (3d) 533 (B.C.C.A.)

R. v. Logan (1988), 46 C.C.C. (3d) 354 (Ont. C.A.), affirmed on other grounds (1990), 58 C.C.C. (3d) 391 (S.C.C.)

### **Procedure For Prior Inconsistent Statements**

The following is a suggested procedure for using ss. 20 and 21. Note that while the basic steps are the same, there are some slight differences in approach, depending on the aim sought to be achieved.

1. During the examination-in-chief of the witness, make a note (as far as possible) of any passages on which the witness will be impeached.
2. Decide whether the aim is to force the witness to adopt as correct the prior inconsistent statement, or simply to impeach the credibility of the witness.
3. On cross-examination, re-commit the witness to the evidence given in chief. Rather than asking him the question he was asked in chief and hoping his reply will be the same, do this by putting his evidence to him directly, e.g.: "When my friend asked you earlier today what colour the car that hit yours was, you said "white", didn't you?"

4. Draw the attention of the witness to the circumstances of the making of the previous inconsistent statement: time, place, who was present. Ask him if he recalls making a statement at that time.
5. Put the previous inconsistent statement to the witness, e.g.: "At that time, you said the car was black, didn't you?"
6. If the intention is to have the witness adopt the previous statement, have him admit that the previous statement was correct. It may be necessary to take the witness through all the circumstances that would make it more likely to be correct (closer to the event, no time for him to have consulted with other persons, etc.).
7. Note that if the witness does not distinctly admit making the statement, independent proof will be necessary.

### Cross-Examination of Defendant on Prior Testimony

Neither s. 13 of the **Charter** nor s. 9(2) of the Ontario **Evidence Act** prevents a defendant being cross-examined on evidence given in a prior proceeding (including a previous trial on the same matter) for the purpose of impeaching his credibility. The previous statement may only be used to impeach the defendant, however, and is not evidence of the truth of its contents (unless it is adopted by the witness). Since the statement is not being used to incriminate the defendant directly, it does not violate either the constitutional or the statutory protections.

R. v. Kuldip (1990), 61 C.C.C. (3d) 385 (S.C.C.)

While that case dealt specifically with a situation where the defendant had *chosen* to give evidence at the prior proceeding, it is at least arguable, based on the reasoning used by the majority in the Supreme Court of Canada, that the same result would be reached where the defendant was *compelled* to give evidence at a prior proceeding (for example, where the defendant was subpoenaed to give evidence for either the Crown or the defence at the trial of a co-defendant not being tried jointly).

### Cross-Examination on Documents

A defendant may not be cross-examined on a document (other than a prior inconsistent statement) unless the Crown has established the document's admissibility.

R. v. Stewart (1991), 62 C.C.C. (3d) 289 (Ont. C.A.)

See "Documentary Evidence", *infra*



### Cross-Examination of Own Witness

Under certain circumstances, a party may cross-examine a witness the party itself has called, either on an inconsistent statement or at large.

See "Adverse Witnesses", *supra*

### Cross-Examination as to Previous Convictions

As a general principle, any witness other than the defendant may be cross-examined on prior bad acts in order to impeach credibility. Generally, a defendant may not be cross-examined on prior bad acts that have not resulted in a conviction unless he has put his character in issue by leading evidence of good character.

Any witness (including the defendant, subject to the discretion noted below) may be asked on cross-examination whether he has been convicted of a criminal offence. If he denies or refuses to answer, the cross-examiner must prove the convictions.

Ontario Evidence Act, s. 22

R. v. Titchner (1961), 131 C.C.C. 64 (Ont. C.A.)

This section is a statutory power, and is separate and distinct from the common law doctrine that permits the impeachment of a witness and (where he has put his character at issue) the defendant by proof of prior bad acts. While these two doctrines overlap in practice, they are conceptually different and must be distinguished.

Cross-examination on previous convictions goes only to the credibility of the witness. Where the witness is the defendant it does not bear directly on the issue of guilt or innocence.

R. v. Fushtor (1946), 85 C.C.C. 283 (Sask. C.A.)

R. v. Stratton (1978), 42 C.C.C. (2d) 449 (Ont. C.A.)

The existence of the prior record, as well as the acknowledgement or denial of it by the witness, affects the weight to be given to his evidence.

Unquestionably, the theory upon which prior convictions are admitted in relation to credibility is that the character of the witness, as evidenced by the prior conviction or convictions, is a relevant fact in assessing the testimonial reliability of the witness.

R. v. Stratton (1978), 42 C.C.C. (2d) 449 (Ont. C.A.) at 461

Morris v. R. (1979), 43 C.C.C. (2d) 129 (S.C.C.)

R. v. Corbett (1988), 41 C.C.C. (3d) 385 (S.C.C.)

The trial judge should not ask any witness (including the defendant) if he or she has a criminal record. Such questions should be left to counsel.

R. v. Stewart (1991), 62 C.C.C. (3d) 289 (Ont. C.A.)

### **What Is "Conviction" for Purposes of Cross-Examination**

Any witness may be cross-examined as to a conviction which is under appeal at that time.

Hewson v. R. (1979), 42 C.C.C. (2d) 507 (S.C.C.)

A defendant, or any other witness, may be cross-examined as to offences committed while he was a juvenile or young offender.

Morris v. R. (1979), 43 C.C.C. (2d) 129 (S.C.C.)

R. v. Scott (1984), 16 C.C.C. (3d) 17 (Ont. G.S.P.)

The cross-examination may be carried out whether or not the person cross-examined is still a young offender. Such a cross-examination, moreover, is not a "publication" within the meaning of the **Young Offenders Act**.

R. v. Scott (1984), 16 C.C.C. (3d) 17 (Ont. G.S.P.)

A witness, including a defendant, may be cross-examined as to a conviction in a foreign country if the foreign offence would be an offence in Canada.

R. v. Stratton (1979), 42 C.C.C. (2d) 449 (Ont. C.A.)

A defendant may not be cross-examined on to charges which had been laid but later withdrawn.

R. v. Skippen, [1970] 1 O.R. 689 (Ont. C.A.)

A Crown witness who is testifying against a defendant may be cross-examined as to charges pending against him for the purpose of showing his motive for favouring the Crown.

Titus v. R. (1983), 2 C.C.C. (3d) 321 (S.C.C.)

Note, however, that this is based on the common law right to examine a witness other than the defendant on discreditable conduct, and not the statutory right to cross-examine on previous convictions.



A defendant may not be cross-examined on offences of which he was found guilty and then granted a discharge.

R. v. Tan (1975), 22 C.C.C. (2d) 184 (B.C.C.A.)

R. v. Danson (1982), 66 C.C.C. (2d) 369 (Ont. C.A.)

However, a witness other than the defendant may be cross-examined on an offence disposed of by way of a discharge. The right to cross-examine is part of the common law right to cross-examine on discreditable conduct in order to impugn credibility, and does not depend on s. 22 of the **Evidence Act**.

R. v. Cullen (1989), 52 C.C.C. (3d) 459 (Ont. C.A.)

### **Previous Convictions Not To Include Provincial Offences**

It has been held that s. 22 of the Ontario **Evidence Act** refers to federal criminal offences and does not allow cross-examination on offences under provincial statutes.

Street v. City of Guelph, [1965] 2 C.C.C. 215 (Ont. H.C.)

It may be that this statement is too broad and that a person may be cross-examined on convictions for a provincial offence where that conviction reflects on the dishonesty or lack of truthfulness of the witness.

Deep v. Wood (1983), 143 D.L.R. (3d) 246 (Ont. C.A.)

However, a defendant may not be examined on a **Highway Traffic Act** conviction that does not involve any element of moral turpitude.

R. v. Roher (unreported, Ont. Prov. Ct., May 17, 1985, per Grant J.)

### **Discretion to Disallow Questions to Defendant as to Convictions**

A trial judge has a discretion to refuse to permit cross-examination of the defendant on prior convictions where the introduction of evidence of prior misdeeds may be unfairly prejudicial to the defendant. Factors that the judge should consider in exercising his discretion include:

- (i) the nature of the previous conviction;
- (ii) the remoteness or nearness in time to the present conviction;
- (iii) the extent to which an attack has been made on the credibility of the Crown witnesses, particularly by the use of their records.

R. v. Corbett (1988), 41 C.C.C. (3d) 385 (S.C.C.)

### **Procedure for Cross-Examination as to Convictions**

A witness should be asked the name of the offence, the time and place of the conviction, and the sentence imposed. Details of the offence are not permitted under s. 22 (although a witness other than the defendant may be asked such questions as part of the common law right to cross-examine on prior bad acts).

R. v. Boyce (1976), 23 C.C.C. (2d) 16 at 35-37 (Ont. C.A.)

R. v. McLaughlin (1974), 20 C.C.C. (2d) 59 (Ont. C.A.)

Apparently, in other provinces, the general question, "were you convicted of any offences?" is permitted.

R. v. Clark (1978), 41 C.C.C. (2d) 561 (B.C.C.A.)

### **Cross-Examination of Defendant on Discreditable Conduct**

Generally, a defendant, unlike an ordinary witness, cannot be cross-examined on discreditable acts, unless he puts his character in issue or the discreditable act resulted in a conviction. However, if the cross-examination seeks directly to prove the falsity of some part of the defendant's evidence, it may be carried out even though it incidentally shows discreditable conduct by the defendant.

R. v. Davison et al. (1974), 20 C.C.C. (2d) 424 (Ont. C.A.)

R. v. Danson (1982), 66 C.C.C. (2d) 369 (Ont. C.A.)

### **Rule Against Rebuttal on Collateral Issues**

The general rule, based on the principles of simplicity, economy, and avoiding a multiplicity of issues, is that answers given to questions put in cross-examination concerning collateral matters must be treated as final. The cross-examiner must take the answer as given and may not contradict the witness by evidence in rebuttal. Generally, a matter will be collateral where it is not determinative of an issue arising in the pleadings or indictment or not relevant to matters which must be proved for the determination of the case.

Krause v. R. (1986), 29 C.C.C. (3d) 385 (S.C.C.)

It is often said that the party cross-examining is "bound" by the answer received. This is only true in the sense that the party cannot adduce evidence to contradict it. Neither the party cross-examining nor the trier of fact is required to accept the evidence as true.

Krause v. R. (1986), 29 C.C.C. (3d) 385 (S.C.C.)

It appears that testimony by a witness as to his former acts and conduct generally is a collateral matter that may not be met by rebuttal evidence. However, testimony by a witness about his former acts and conduct relative to the subject-matter or issues of the case will not be collateral and may be contradicted.

R. v. Demeter (1975), 25 C.C.C. (2d) 417 (Ont. C.A.), aff'd [1978] 1 S.C.R. 538 [S.C.C.]

R. v. Cassibo (1982), 70 C.C.C. (2d) 498 (Ont. C.A.)

Krause v. R. (1986), 29 C.C.C. (3d) 385 (S.C.C.)

It was formerly the case in Ontario that the rule prohibiting rebuttal evidence on collateral matters had no application where the issue, even if collateral, was raised in the examination-in-chief of the witness.

R. v. Gross (1973), 9 C.C.C. (2d) 122 (Ont. C.A.)

It is now clear that the collateral matters rule does apply to such evidence. The fact that a matter is raised in examination-in-chief does not entitle the other party to bring rebuttal evidence unless the matter is otherwise relevant to a matter other than credibility.

R. v. Hrechuk (1950), 98 C.C.C. 44 (Man. C.A.)

Krause v. R. (1986), 29 C.C.C. (3d) 385 (S.C.C.)

### **Cross-Examination on Documents Used to Refresh Memory**

For a discussion of the rights of a cross-examiner when a document is used to refresh the memory of a witness, see "Refreshing Memory", *infra*

### **Requirement of Cross-Examination if Contradiction Planned**

Generally, any matter upon which it is proposed to lead evidence contradicting the evidence in chief given by a witness must be put to that witness in cross-examination to allow him to explain the apparent contradiction.

Brown v. Dunn (1893), 6 R. 67 (H.L.)

R. v. Foxton (1920), 34 C.C.C. 9 (Ont. S.C.)

R. v. Jackson and Woods (1974), 20 C.C.C. (2d) 113 (Ont. H.C.)

R. v. MacDonald (1989), 48 C.C.C. (3d) 230 (N.S.C.A.)

R. v. Grant (1989), 49 C.C.C. (3d) 410 (Man. C.A.)

It is not required that the evidence that will contradict the witness be put to him in detail. There must, however, be notice of the allegation to the witness and an opportunity to explain.

R. v. Grant (1989), 49 C.C.C. (3d) 410 (Man. C.A.)

Where the matter is not put to the witness in cross-examination, the judge may prevent contradictory testimony from being given, or may permit the party subsequently to call the witness in rebuttal.

R. v. Jackson and Woods (1974), 20 C.C.C. (2d) 113 (Ont. H.C.)

R. v. MacDonald (1989), 48 C.C.C. (3d) 230 (N.S.C.A.)

Cf. R. v. Dyck, [1970] 2 C.C.C. 283 (B.C.C.A.)

Where, however, the defendant testifies to a particular matter in support of his innocence, and it is clear from the case as a whole that to the extent the testimony goes to his innocence it is not accepted by the Crown, it is not necessary to cross-examine the defendant on the particular point.

Palmer and Palmer v. R. (1979), 50 C.C.C. (2d) 193 (S.C.C.)

### **Witness Not to Comment on Veracity of Other Witness**

A witness during cross-examination should not be asked his opinion on the veracity of other witnesses. Such questions are unfair and irrelevant.

R. v. Markadonis (1935), 63 C.C.C. 122 at 126 per Mellish J., affirmed (1935), 64 C.C.C. 41 (S.C.C.)

- Q. You are saying that these things that are in the statement you didn't say to Crawford at that time?
- A. No, no, not at that time.
- Q. If you were to say--if he were to say otherwise then he would be lying?

The last question is improper.

R. v. Ruptash (1982), 68 C.C.C. (2d) 182 (Alta. C.A.)



### Suggestions For Cross-Examination

1. The first step in cross-examination should always be a considered decision as to whether any cross-examination is necessary at all. A cross-examination that achieves nothing can actually bolster the credibility of a witness. Before beginning cross-examination, counsel should ask himself or herself "Did this witness do anything to hurt me?", "Can I do anything about it?", and "Can this witness give any evidence helpful to me?". Doing this will focus the cross-examination, if needed.
2. Cross-examinations should be planned carefully, in advance of the trial whenever possible.
3. Where you plan to impeach a witness by a prior inconsistent statement, take verbatim notes (as far as possible) of the evidence given in chief. This allows you to tie the witness down and ensure that there can be no wriggling out from the impeachment.
4. If you anticipate there will be more than one witness for the opponent, request an order for exclusion of witnesses at the beginning of the trial.
5. Maintain tight control of the witness by using leading questions whenever possible.
6. While the old rule "never ask a question to which you don't know the answer" is overstated, it is preferable to avoid questions unless you either know what the answer must be or know that whatever answer is given cannot hurt you.
7. A cross-examiner's aims can be accomplished by obtaining contradictory statements from the witness, by eliciting from the witness facts tending to counter the effect created by the facts testified to by him, by eliciting facts which subvert the conclusions at which the opposite party is aiming and by showing that the facts deposed by the witness are not the result of his own perception.
8. Manner plays a great role in advocacy. A different answer may be elicited by a different tone by the examiner. Emphasis upon certain words may produce different versions of the same story.
9. Be careful when exploring matters that were omitted in your opponent's examination-in-chief. He or she may be trying to "sandbag" you by leaving you to bring out evidence detrimental to your case.

10. A witness may be led on to expose a manifest bias. A strong interest weakens the side on which it lies. A witness may also be led to show habitual exaggeration.
11. Unless the answer is essential to your case, do not cross-examine for explanations. Any question "why" is dangerous in cross examination.
12. Whenever you have fairly caught a witness, do not sacrifice the advantage by exhibiting him too ostentatiously. Similarly, do not put the same question upon some important piece of evidence to every witness. If one contradicts another, let the matter rest. A third witness may make a guess and corroborate the first which only weakens the effect of the contradiction.
13. Remember that your opponent can only re-examine on matters arising out of your cross-examination. Avoid asking a question which may "open the door". This can be particularly dangerous if your question opens up a matter that your opponent could not have covered in examination in chief.



E6-16

EVIDENCE

## DOCUMENTARY EVIDENCE

### Introduction

Documentary evidence often creates difficulties for counsel. When such difficulties do arise, it is usually because counsel has failed to think through *what purpose* the document is being used for and *what hurdles* must be crossed before the document can be used for that purpose.

Documents may be adduced for two main purposes: as original evidence, or as proof of the truth of their contents. Where a document is adduced as original evidence, the main concern is authenticity (whether the document is what it purports to be or what counsel alleges it to be). Where the document is adduced to prove the truth of its contents, authenticity is still an issue, but counsel must also consider the best evidence rule and the rule against hearsay. Formerly, these two rules narrowly restricted the use of documents as evidence. Over time, however, courts and legislatures have recognized that technological changes, and the need for functional rather than formal rules of evidence, require some relaxation of the rules.

A good general reference on documentary evidence is J.D. Ewart *Documentary Evidence in Canada* (Toronto, Carswell, 1984).

### Ontario Evidence Act

See ss. 24-59

### Authenticity

A document, like any other exhibit, must be proved to be authentic. For example, if counsel wishes to use a document found in the possession of the defendant to show knowledge on the part of the defendant, counsel must establish that the document put forward in court was in fact the one found in the defendant's possession.

Similarly, if it is alleged that a document was written by the defendant, there must be evidence permitting the trier of fact to find that the letter was written by the defendant before the letter is admissible.

R. v. Petersen (1983), 45 N.B.R. (2d) 271 (N.B.C.A.) at 282-285

There can be direct evidence of the document's authenticity, such as the identification of the document by the writer or an eyewitness to its signing.

First National Bank v. Christy Crops Limited (1981), 47 N.S.R. (2d) 224 (N.S. C.A.)

There can also be circumstantial evidence of its authenticity. For example, a person who did not see the actual signing of a document may be able to identify it by recognizing the signature or handwriting of the alleged author. Section 57 of the Ontario **Evidence Act** provides statutory authority for such comparisons.

The receipt by mail of a letter purporting to be a reply to an earlier letter sent by the person receiving the reply is circumstantial evidence that the letter came from the person to whom the earlier letter was written. Accordingly, it will be admissible in evidence.

Stevenson v. Dandy, [1920] 2 W.W.R. 643 (Alta. S.C.A.D.)

R. v. Container Materials Ltd., [1940] 4 D.L.R. 293 (Ont. H.C.)

If a party against whom the document is being tendered admits its authenticity, then it is not necessary for the other party to prove that fact.

Steven v. LeBlanc's Welding and Fabricating Limited (1982), 40 N.B.R. (2d) 389 (N.B.C.A.) at 395-96

Statutory provisions allowing copies of documents to be admitted into evidence often provide for the means of authentication.

See, e.g., Highway Traffic, ss. 210(7),(8)

### **Use of Documentary Evidence in Court**

Once the authenticity of a document has been established, it may be tendered in evidence either as proof of the truth of its contents or as original evidence.

If the document is being tendered for the truth of its contents, it must either meet the requirements of the hearsay and best evidence rules or fall into one of the exceptions to each of those rules.

### **The Best Evidence Rule**

The best evidence rule provides that where a document is adduced to prove the truth of its contents, the original document must be produced. A party will not be permitted to prove the contents of the document by secondary (oral or documentary ) evidence.

R. v. Betterest Vinyl Manufacturing Ltd. (1989), 52 C.C.C. (3d) 441 (B.C.C.A.)

The rule, which developed hundreds of years before modern copying techniques, was based on the potential unreliability of handwritten copies and the memories of witnesses. While the rule did not preclude the admissibility of secondary evidence, it required evidence of why the "best evidence" (the original) was not available before secondary evidence could be given.

R. v. Cotroni; Papalia v. R. (1979), 45 C.C.C. (2d) 1 (S.C.C.)

Due to the recent developments discussed below, the distinction between primary and secondary evidence has become much less important than it once was.

### Exceptions to the Best Evidence Rule

The common law has long recognized a series of exceptions to the best evidence rule permitting proof of the contents by secondary evidence. These exceptions were based on the actual or practical unavailability of the original. At common law, secondary evidence of the contents of a document was admissible when:

1. The nature of the object is such that it would be impossible or impracticable to bring it into the courtroom. Examples are inscriptions on walls or tombstones.  
Mortimer v. McCallan (1840), 157 E.R. 320 (K.B.)
2. The document is a public document which cannot be produced without great inconvenience to the public.  
C. Tapper *Cross on Evidence*, 7th ed. (London, Butterworths, 1990) at 687
3. The original document is in the hands of a third party who cannot legally be compelled to produce it.  
C. Tapper *Cross on Evidence*, 7th ed. (London, Butterworths, 1990) at 686
4. The defendant has failed to produce an original document after being served with a notice to produce it (this has little or no application to criminal proceedings, especially since the **Charter**).  
R. v. Elworthy (1867), 1 C.C.R. 103
5. The original cannot be found after a due search.  
Brewster v. Sewell (1820) 106 E.R. 672
6. The document has been destroyed. However, where the document has previously been destroyed by the party who now seeks to lead secondary evidence of its contents, the secondary evidence is not admissible unless the party establishes that the destruction of the original was accidental or was done in good faith without any intention to prevent its use as evidence.  
R. v. Cotroni; Papalia v. R. (1979), 45 C.C.C. (2d) 1 (S.C.C.)

More recently, the courts have dramatically relaxed the former rule. It now seems that copies of documents (provided that they are proved or admitted to be accurate copies of the original) are admissible, and there is no need for the party seeking to lead secondary evidence to establish that the original is unavailable. There may be a qualification that if the party has the original in its possession, it must produce it. As well, the special rule governing the situation where the party has itself destroyed the original still applies.

R. v. Cotroni; Papalia v. R. (1979), 45 C.C.C. (2d) 1 (S.C.C.)

R. v. Wayte (1982), 76 Cr. App. R. 110 (U.K.C.A.)

R. v. Betterest Vinyl Manufacturing Ltd. (1989), 52 C.C.C. (3d) 441 (B.C.C.A.)

### **Statutory Exceptions to the Best Evidence Rule**

There are numerous statutory exceptions to the best evidence rule that make properly authenticated copies of documents admissible. Such provisions may also create an exception to the hearsay rule as well, although each section must be read carefully to determine its exact effect. Some examples include:

1. Copies of statutes, ordinances, and other public documents printed under the authority of a government body.  
Ontario Evidence Act, R.S.O. 1990, c. E-23, s. 25
2. Copies of documents filed with the Ministry of Transportation and Communications  
Highway Traffic Act, s. 210(7)
3. Photographs of records  
Ontario Evidence Act, section 34
4. Medical reports  
Ontario Evidence Act, section 52
5. Copies of instruments certified by a land registrar  
Ontario Evidence Act, section 53

### **The Hearsay Rule**

The rule against hearsay applies to documentary evidence as well as oral testimony.

R. v. Harris (1947), 89 C.C.C. 231 (Ont. C.A.)

R. v. Gillespie (1967), 51 Cr. App. R. 172 (U.K.C.A.)



Accordingly, a party seeking to have a document admitted as proof of the truth of its contents will have to find an applicable exception to the rule against hearsay.

### Common Law Exceptions to the Hearsay Rule

The common law exceptions for oral hearsay also apply to documents. There are additional exceptions that apply to documents. Two of these, the business records exception and the exception for judicial documents, are discussed separately below.

The hearsay exception covering admissions against interest applies to documents. Documents made by, or under the direction of, the defendant are admissible to prove the truth of their contents as an admission against interest.

R. v. Smart and Young (1931), 55 C.C.C. 310 (Ont. C.A.)

As well, documents found in the possession of a defendant will be admissible against him to prove the truth of their contents as an adoptive admission against interest if he has in any way recognized, adopted or acted upon the document. However, it seems that mere possession of the document, even with knowledge of its contents, is not sufficient to make it admissible for proof of the truth of those contents.

R. v. Famous Players Theatres (1932), 58 C.C.C. 50 (Ont. H.C.) at 94 -95

R. v. Turlon (1989), 49 C.C.C. (3d) 186 (Ont. C.A.)

It would follow by analogy to oral admissions against interest that such an admission may be admissible as proof of the truth of its contents even if the defendant had no direct way of knowing that the statement was true and was himself relying on hearsay.

R. v. Streu [1989] 1 S.C.R. 1521

This exception is distinct from the use of the document as original circumstantial evidence of state of mind (see *infra*).

Charts produced by government agencies that are in general use for navigation by sea or air are admissible to show the truth and accuracy of their contents without further proof (at least where the proposed use is to establish physical features rather than legal matters such as boundaries). The fact that they are produced by government and actually used for navigation produces a sufficient guarantee of trustworthiness.

R. v. Ingram (1978), 9 B.C.L.R. 195 (B.C.C.A.)

R. v. Inuvik Coastal Airways Ltd. (1983), 10 C.C.C. (3d) 89 (N.W.T.S.C.)



### Statutory Exceptions to the Hearsay Rule

One significant statutory exception to the hearsay rule is the "business records rule", discussed separately below.

Several other provisions of the Ontario **Evidence Act**, and other statutes, make documents admissible for the truth of their contents. The following are examples only.

1. Notices in the Canada Gazette, Ontario Gazette, or corresponding publications in other provinces.

Evidence Act, s. 28

2. Entries in books of a municipality or government department.

Evidence Act, s. 31

3. Entries made in the books of a bank or Province of Ontario Savings Office

Evidence Act, s. 33

4. Copies of documents filed in the Ministry of Transportation under the Highway Traffic Act and statements containing information from records required to be kept under the Highway Traffic Act.

Highway Traffic Act, s. 210(7)

### Business Records

At common law, records made by a business in the usual and ordinary course of business were formerly not admissible to prove the truth of their contents, since they would be hearsay. However, in 1970, the Supreme Court of Canada recognized a common law exception to the hearsay rule for such records, provided:

- (i) the record was made by a person who had actual knowledge of the matters recorded;
- (ii) the person was under a duty to make the record;
- (iii) the record was made in the usual and ordinary course of business;
- (iv) there was no motive to misrepresent.

The court made it clear that the death or unavailability of the maker of the record was *not* a prerequisite to admissibility.

Ares v. Venner (1970), 14 D.L.R. (3d) 4 (S.C.C.)

As well, s. 35 of the Ontario **Evidence Act** provides a statutory mechanism for the admission of business records. The section must be read carefully since all the requirements must be met before the section can be used. Two particular points should be noted. First, s. 35(3) provides that the maker of the record need not have personal knowledge of the matter recorded, thus permitting so-called "double hearsay". Second, a party seeking to use the section must give notice to all other parties.

Some other provinces have enacted similar legislation, and there is a corresponding provision in s. 30 of the **Canada Evidence Act**. Since the requirements vary from jurisdiction to jurisdiction, cases discussing other business records provisions must be read with caution.

The actions of a police officer in completing a motor vehicle accident report are not part of a "business". The accident report is accordingly not admissible for the proof of its contents as a business record.

*Woods v. Elias* (1978), 21 O.R. (2d) 840 (Ont. Co. Ct.)

The court did not discuss whether the factual contents of the report would have been admissible under s. 210(7) of the **Highway Traffic Act**.

However, in Nova Scotia, air surveillance of two ships suspected of transporting narcotics has been held to be part of the "usual and ordinary course of business" of the Canadian Armed Forces.

*R. v. Sunila and Soleyman* (1986), 26 C.C.C. (3d) 331 (N.S.S.C.T.D.)

A print-out of data contained in a computer may be a "record" at common law.

*Tecoglass, Inc. v. Domglas, Inc.* ((1985), 51 O.R. (2d) 196 (Ont. H.C.)

A computer print-out has also been held to be a "record" for the purposes of the **Canada Evidence Act** "banker's books" provision (s. 29).

*R. v. Bell and Bruce* (1982), 35 O.R. (2d) 164 (C.A.), aff'd  
(1985), 35 O.R. (2d) 164 (S.C.C.)

A computer print-out is a "record" for the purposes of the business records provision of the **Canada Evidence Act**.

*R. v. Vanlerberghe* (1976), 6 C.R. (3d) 222 (B.C.C.A.)

*R. v. Bicknell* (1988), 41 C.C.C. (3d) 545 (B.C.C.A.)

It is not clear if the common-law business records exception survives in Ontario in view of the statutory exception created by s. 35. The better view seems to be that the common-law exception co-exists alongside the statutory provision (see especially s. 35(5), not considered in **Exhibitors Inc. v. Allen**).

Setak Computer Services Inc. v. Burroughs Business Machines Ltd. (1977)  
15. O.R. (2d) 750 (Ont. H.C.)

Tecoglass, Inc. v. Domglas, Inc. (1985), 51 O.R. (2d) 196 (Ont. H.C.)

Exhibitors Inc. v. Allen (1989), 70 O.R. (2d) 103 (Ont. H.C.)

However, the law in Ontario seems to be that the common-law exception only applies where the maker of the record had first-hand knowledge of the matter recorded. So-called "double hearsay" is not permitted at common law.

Setak Computer Services Inc. v. Burroughs Business Machines Ltd. (1977)  
15. O.R. (2d) 750 (Ont. H.C.)

Tecoglass, Inc. v. Domglas, Inc. (1985), 51 O.R. (2d) 196 (Ont. H.C.)

Exhibitors Inc. v. Allen (1989), 70 O.R. (2d) 103 (Ont. H.C.)

In Alberta, the common-law exception has been held to permit "double hearsay". The maker of the record need not have actual knowledge of the matter recorded.

R. v. Monkhouse (1987), 61 C.R. (3d) 343 (Alta. C.A.)

The requirements of a statutory business records provision do not apply where a statute contains its own provision for the admission of documents.

R. v. Jarry (1991), 65 C.C.C. (3d) 566 (Que. C.A.)

## Original Evidence

A document is not always tendered to prove the truth of its contents. A document may also be tendered as original evidence. In other words, a document may be circumstantial evidence of some other matter independent of the truth of its contents. Very often, the document is used to show some mental state on the part of the defendant.

Documents found in the possession of the defendant and used as original evidence may provide circumstantial evidence of such matters as:

### 1. The intent of a defendant

R. v. Attwood (1891), 20 O.R. 574 (H.C.J.)

2. Knowledge of circumstances by the defendant

R. v. Armand Cote Ltee (1973), 21 C.C.C. (2d) 525 (Ont. C.A.)

R. v. Turlon (1989), 49 C.C.C. (3d) 186 (Ont. C.A.)

3. Complicity in an offence

R. v. Bloomfield et al. (1973), 10 C.C.C. (2d) 398 (N.B.S.C.A.D.)

R. v. Turlon (1989), 49 C.C.C. (3d) 186 (Ont. C.A.)

The possession by the defendant of a letter furthering a drug conspiracy was evidence of his knowledge and complicity in that conspiracy, whether or not the defendant knew of the contents of the letter.

R. v. Turlon (1989), 49 C.C.C. (3d) 186 (Ont. C.A.)

Documents may also be real evidence. For example, an allegedly forged cheque may be admitted as an exhibit to lay a foundation for establishing through other evidence: (i) that this was the cheque tendered (ii) that the cheque was forged (iii) that the person who forged the cheque was the defendant.

### Accountant's Summary of Exhibits

A summary of transactions or records prepared by an accountant entered in evidence on a trial is admissible to assist the court in understanding and digesting the materials. This allows the trier of fact to decide the case without getting bogged down with voluminous and tedious documents. The summary must be presented by an expert and based on documents that are, or will be, introduced into evidence.

R. v. Scheel (1979), 42 C.C.C. (2d) 31 (Ont. C.A.)

R. v. Simmonds et al., [1967] 2 All E.R. 399 (C.A.)

It seems that in some other provinces it is not necessary to introduce all supporting documents into evidence, at least where the documents are available for inspection at the request of the opposing party.

R. v. Kaufmann (1981), 22 C.R. (3d) 274 (Sask. Q.B.)



## Judicial Documents

At common law, judicial documents (such as informations, indictments and certificates of conviction, together with endorsements thereon) may be proved by producing the original document or a copy certified by the seal of the court from which the document emanates. This rule continues to apply notwithstanding any statutory provisions for the admission of such records. No notice is required. Moreover, the record is apparently admissible as proof of the truth of its contents.

R. v. Tatomir (1989), 51 C.C.C. (3d) 321 (Alta. C.A.), leave to appeal to S.C.C. refused February 15, 1990

## Cross-Examination on Documents

Where counsel wishes to cross-examine a defendant by using the contents of a document as proof of their truth, a proper foundation must be laid. If the defendant did not make or adopt the document, and does not admit the truth of the contents, the document must be properly authenticated and there must be some applicable exception to the hearsay rule.

R. v. Stewart (1991), 62 C.C.C. (3d) 288 (Ont. C.A.)

## Copies of Documents

At least in situations where the best evidence rule does not apply, a photocopy of a document is acceptable as being a true copy without proof that the copy was compared with the original. The fact and reliability of a photocopying machine is a matter that can properly be the subject of judicial notice. The question of tampering (either with the copy or with the original) goes to weight rather than admissibility.

R. v. Lutz (1978), 44 C.C.C. (2d) 143 (Ont. Prov. Ct.)

It seems that a copy of a document may be used for purposes other than proving the truth of the contents where there is a sufficient guarantee of accuracy of the copy. This principle applies to a document used to refresh memory. It presumably would also apply to a copy of a previous inconsistent statement.

R. v. Alward (1976), 32 C.C.C. (2d) 416 (N.B.C.A.)

## Documents Filed Under Highway Traffic Act

Sections 210(6),(7) and (8) of the **Highway Traffic Act** provide for the admissibility of certain documents filed with the Ministry. Two points should be noted about the section. First, the section addresses the authenticity, best evidence, and hearsay concerns that arise with any document used to prove the truth of its contents.

Second, while the section is most commonly applied to the proof of licence suspensions and driving records, it is not limited to these items. On its face, at least, it is broad enough to cover the contents of an accident report filed under s. 199(3).

The provisions of this section, which permit documents to be admitted without notice to the defendant, do not violate s. 7 of the **Charter**.

R. v. Triumbari (1988), 42 C.C.C. (3d) 481 (Ont. C.A.)



E7-12

EVIDENCE

## EXAMINATION-IN-CHIEF

### Introduction

The examination of a witness by the party who calls him is referred to as examination-in-chief (or direct examination).

### Provincial Offences Act

See s. 46(3).

### Purpose

The purpose of examination-in-chief is to get the witness to give his or her evidence coherently, concisely and credibly. This is not always easy.

The aim of examination-in-chief is to elicit from the witness a complete, orderly story, told by the witness in his own natural way, with the minimum of prompting. . . . Orderliness and thoroughness rank together as the leading principles of examination-in-chief.

J.H. Munkman, *The Technique of Advocacy* (London: Stevens & Sons, 1951) at 41, 44

### Leading Questions

A leading question is a question which either suggests the desired answer or assumes the existence of a disputed fact. A question which requires a yes or no answer is not leading unless it falls into one of these categories.

As a general rule, counsel cannot ask leading questions during examination-in-chief. There are several reasons given for this rule. The use of leading questions may allow counsel to shape improperly or colour the witness' evidence. There is a danger that a nervous witness will simply assent to a question or give the easiest answer, and accordingly give evidence that he did not intend to give or does not believe. As well, leading questions are objectionable because of the possibility of pre-arrangement between the examiner and the witness as well as the impropriety of suggesting facts not in evidence.

### Exceptions to the Rule Against Leading Questions

The rule that a witness cannot be asked leading questions has several exceptions based on necessity, convenience or established practice.

1. A witness who has made a prior inconsistent statement may be asked leading questions.

Ontario Evidence Act, ss. 20, 21

See "Adverse Witnesses" *supra*

2. A witness may always be led on the formal introductory parts of his testimony. It is the duty of counsel to dispose of preliminary matters as efficiently as possible and bring the witness to the facts in issue.

"...the general rule is that in examining one's own witness, not that no leading questions may be asked, but that on material points one must not lead his own witness but on points that are merely introductory and form no part of the substance of the inquiry one *should* lead".

Maves v. Grand Trunk Pac. Rlwy. Co. (1913), 14 D.L.R. 70 (Alta. S.C.) at 74-75

3. The qualifications of an expert witness may, and should, be elicited through leading questions. This not only speeds up the matter but also avoids the appearance of boasting by the expert.

P.B.C. Pepper "Scientific Proof" in Law Society of Upper Canada *Special Lectures 1959: Jury Trials*

4. The presiding judge or justice may ask leading questions (but should avoid doing so).

Connor v. Township of Brant (1914), 6 O.W.N. 206 (Ont. C.A.)

5. As it would often be impossible to persuade a witness to identify a person or thing in court without the aid of leading questions, it is permissible to direct the attention of the witness directly to them, at least where there are no other ways of doing this. For example, "Was that the man you saw?" or "Was that the book he lent to you?" (although the information can usually be elicited in a more persuasive non-leading form through a series of questions: e.g. "Would you recognize the man you saw if you saw him again?" - "Is that man present in this courtroom?" - "Please point him out").

Maves v. Grand Trunk Pac. Rlwy. Co. (1913), 14 D.L.R. 70 (Alta. S.C.)

6. When the inability of the witness to answer a question is obviously caused by a defective memory. For example, the witness leaves out an important part of his testimony. After repeated efforts to have him recall it, the questioner should be permitted to ask a question which contains a reference to the subject matter of the statement that has been omitted.

Maves v. Grand Trunk Pac. Rlwy. Co. (1913), 14 D.L.R. 70 (Alta. S.C.)

Reference Re R. v. Coffin (1956), 23 C.R. 1 at 19 (S.C.C.)

7. Where evidence is extremely complicated, such as medical evidence, it may be necessary to permit direct queries to clarify certain points.
8. When it is necessary to obtain an express denial of some allegation, counsel may have to ask certain direct questions which may *indirectly* suggest the answer that counsel wants. For example:

Q: "It has been suggested by the previous witness that on the day in question you admitted to him that you had been drinking since early that morning--did you make that statement?"

A: "I certainly did not"

9. When a witness is handicapped, leading questions are permitted. They may be employed to assist a witness whose ability to testify is hindered due to extreme youth or age, lack of education, mental or physical disability, or any other testimonial limitation.

*"Wigmore on Evidence"* Vol. 3, ss. 769-779

Ratushny, "Basic Problems in Examination and Cross-Examination" (1979), 52 Can B. Rev. 209 at 212

10. A witness who has been declared hostile at common law may be cross-examined at large.

See "Adverse Witnesses", *supra*

### **Residual Discretion of Court**

A trial judge has a residual discretion to allow leading questions where it is necessary in the administration of justice.

Re R. v. Coffin (1956), 23 C.R. 1 at 19 (S.C.C.)

### **Suggestions for Examination-in-Chief**

1. Always know what a witness will say and how that testimony relates to the main features of the case.
2. After having covered the preliminary or introductory matters, it is advisable to let witnesses tell their story in their own words, with the minimum of questioning necessary to confine the witness to the material points of the case. Usually the events should be told in the order in which they occurred, together with the accompanying conversations if these are material, relevant and admissible. Evidence given by a witness in his own words is more credible than a series of short responses to the questioner.

3. With the exception of preliminary matters, a witness should not be asked leading questions unless necessary. Evidence adduced by leading questions is not usually given much weight. On the other hand, it is equally dangerous when the witness comes out with a long story that sounds memorized.
4. When a witness gives a surprising or disappointing answer, drop the question and proceed to more familiar ground without showing your dissatisfaction. Return later to the same question, differently worded, and if he persists in an innocent mistake you may attempt to refresh his recollection after laying the proper foundation.
5. A skilful examiner will leave the witness in such a position as to be able to withstand cross-examination by having the witness reveal every fact and motive completely and all its important bearing upon the attendant circumstances.
6. Witnesses, unaccustomed to courts, are often so confused that they cannot distinguish between the friendly and the adverse counsel. It is your function to put the witness at ease. A series of simple preliminary questions will assist in doing this:

Q: Ms. Smith, I understand that you live here in London?

Q: And I understand that you have lived here all your life?

Q: You graduated from Central High School?

Q: And you subsequently earned an engineering degree from the University?

Q: Are you working as an engineer now?

Q: With what firm?

Q: What does your job there involve?

A gradual shift from leading to non-leading questions during this preliminary questioning will help put the witness at ease and give them a chance to get used to speaking in the courtroom.

7. Questions in examination-in-chief should be carefully framed and deliberately put to bring out so much as you desire, and no more. The court will not be impatient with a pause when it discovers that you have in fact abbreviated the case by confirming the evidence strictly to the point at issue.
8. Keep your questions short. A good rule of thumb is that in general questions should not be longer than one line of transcript (about ten words).
9. An honest story told by one credible witness will serve the purpose of two or three half-hearted witnesses. You must judge for yourself as to which witness will likely fare best in the witness box.



10. If the witness goes off on tangents, you must gradually bring him back. Above all, never be rude to him even if his story is going against you.
11. Develop the evidence in an organized way. Usually, the most practical way to do this is to have the witness give the evidence chronologically. When the witness testifies about a particular event or incident, use your questions to have him set the scene before describing what took place. The order of the subjects in a motor vehicle case might be:
  1. A description of the scene.
  2. How the witness came to be on the scene.
  3. On what street he was proceeding and in what direction.
  4. What vehicles did he see prior to the accident.
  5. What did he see and hear at the moment of impact.
  6. What did he see and hear after the accident.

### **Defendant Must be Given an Opportunity to Testify In Chief**

A defendant who wishes to give evidence on his own behalf must be given the opportunity to do so in chief before being cross-examined.

Michaels v. R. (1969), 8 C.R.N.S. 63 (Ont. S.C.)

### **Defendant's Absolute Right to Call a Witness**

A defendant has an absolute right to call any witness for the defence, including a witness previously called by the Crown and cross-examined by the defence. The court has no discretion in this matter so long as the evidence is relevant.

R. v. Cook (1960), 127 C.C.C. 287 (Alta. C.A.), leave to appeal to S.C.C. refused Dec. 14, 1960





## EXCEPTIONS, EXEMPTIONS, AUTHORIZATIONS OR QUALIFICATIONS

### Introduction

As noted in "Burden of Proof", *supra*, the Crown is generally required to prove all elements of an offence, and negate any defences, beyond a reasonable doubt. This general rule, however, is subject to a number of exceptions. One such exception arises where a statute sets out a general prohibition against some activity, but then sets out further circumstances where the general prohibition does not apply.

### Statutory Provisions

The rules governing exceptions, exemptions, provisos, excuses and qualifications (hereafter, for convenience "exceptions") are set out in ss. 25(9) and 47(3) of the **Provincial Offences Act**.

25. (9) No exception, exemption, proviso, excuse or qualification prescribed by law is required to be set out or negated, as the case may be, in an information.

47. (3) The burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the authorization, exception, exemption or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

It should be noted that s. 25(9) merely sets out a rule of pleading. Section 47(3), on the other hand, substantively affects the onus and burden of proof. Section 47(3) is governed by the substantive nature of the exception and not the issue of whether it has been pleaded: even if the informant chooses to set out an exception in an information, the burden of proof remains on the defendant.

Section 794 of the **Criminal Code** contains an almost identical provision.

### Scope of the Rule

The rule that the onus of proving an exception falls on the defendant was originally developed at common law.

R. v. Edwards, [1975] Q.B. 27 (C.A.)

R. v. Hunt, [1987] A.C. 352 (H.L.)

R. v. Lee's Poultry Ltd. (1985), 17 C.C.C. (3d) 539 (Ont. C.A.)

The common law rule has been continued in the **Provincial Offences Act**. Although the following passage describes the common law rule, it has been accepted as an accurate general statement of the application of the rule in s. 47(3).

...over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments that prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisoes, exemptions and the like, then the prosecution can rely upon the exception.

R. v. Lee's Poultry Ltd. (1985), 17 C.C.C. (3d) 539 (Ont. C.A.) at 542, quoting with approval R v. Edwards, [1975] Q.B. 27 (C.A.) at 39-40

R. v. Daniels (1990), 60 C.C.C. (3d) 392 (B.C.C.A.)

It is sometimes said that the rationale for the rule is that the defendant will have peculiar knowledge as to whether or not he falls within the exception, and so is in the best position to establish this. While this was no doubt a consideration when the rule was being developed, it is not a satisfactory test for determining whether the rule will apply to a particular case. On one hand, the burden of proof does not automatically shift to the defendant merely because he has the best (or only) direct knowledge on some issue: intention, for example, is for the Crown to prove and not for the defence to disprove. On the other hand, the burden of proving the exception does not and should not shift from the defence to the Crown merely because the Crown may be able to adduce evidence as to whether the defendant falls within the exception (for example, by producing a register of licencees or permit holders).

R. v. Edwards, [1975] Q.B. 27 (C.A.)

R. v. Lee's Poultry Ltd. (1985), 17 C.C.C. (3d) 539 (Ont. C.A.)

## Examples

The following are examples of statutory provisions that have been held to fall within the "exception rule".

1. Section 2(1)(a) of the **Compulsory Automobile Insurance Act**, R.S.O. 1990, c. C 25, which provides:

Subject to the regulations, no owner of a motor vehicle shall

(a) operate a motor vehicle....

unless the motor vehicle is insured under a contract of automobile insurance.

Bibeau v. Stone (unreported, Ont. Co. Ct., Northumberland County, Jan. 16, 1984, per Murdoch Co. Ct. J.)

R. v. Horvath (1984), 10:4 Crim. Lawyer's Assn. Newsletter 27 (Ont. Prov. Ct.)

2. Section 27(a) of the **Environmental Protection Act**, R.S.O. 1980, c. 141 [now R.S.O. 1990, c. E 19], which provides:

No person shall operate, establish, alter, enlarge or extend,

(a) a waste management system...

unless a certificate of approval or provisional certificate of approval therefor has been issued by director and except in accordance with any conditions set out in such certificate.

R. v. Dow Chemical Canada Inc. (1987), 1 C.E.L.R.(N.S.) 167 (Ont. Prov. Ct.)

3. Section 3 of the **Meat Inspection Act (Ontario)**, R.S.O. 1990, c. M.5, which provides:

No person shall engage in the business of operating a plant other than an establishment without a licence therefore from the director.

R. v. Lee's Poultry Ltd. (1985), 17 C.C.C. (3d) 539 (Ont. C.A.)

The court held that the licence requirement properly fell within the scope of s. 47(3); however, the words "other than an establishment" did not. The onus lay on the Crown to prove that the plant was "other than an establishment".

4. Section 5(1) of the **Sanitary Control of Shellfish Fisheries Regulations**, C.R.C. 1978, c. 832, which provides:

(1) No person shall, unless he holds a special permit therefor issued under the authority of the Minister,

(a) fish for, dig or take shellfish from a contaminated area...

R. v. Daniels (1990), 60 C.C.C. (3d) 392 (B.C.C.A.)

5. Section 70(1) of the **Liquor Control Act**, R.S.O. 1960, c. 217, which provided:

Except as provided by this Act, The Liquor Licence Act or the regulations hereunder or thereunder, no person shall by himself, his clerk, servant or agent, expose, or keep for sale, or directly or indirectly or upon any pretence, or upon any device, sell or offer to sell, liquor or, in consideration of the purchase or transfer of any property, or for any other consideration or at the time of the transfer of any property, give liquor to any other person.

R. v. Park Hotel (Sudbury) Ltd., [1966] 4 C.C.C. 158 (Ont. C.A.)

### **Burden of Proof**

Section 47(3), and analogous provisions in other statutes, place a persuasive burden on the defendant, not just an evidential burden. The defendant is required to establish the exception on a balance of probabilities.

Perka v. R. (1984), 14 C.C.C. (3d) 385 (S.C.C.)

R. v. Lee's Poultry Ltd. (1985), 17 C.C.C. (3d) 539 (Ont. C.A.)

Schwartz v. R. (1988), 45 C.C.C. (3d) 97 (S.C.C.)

### **Satisfying the Burden of Proof**

A defendant who received an official document that on its face would bring the defendant within the terms of an exception may rely on that document to satisfy s. 47(3). The defendant is not (at least in the absence of evidence that the document is not valid) required to go behind the document to confirm its legal validity.

R. v. Dow Chemical Canada Inc. (1987), 1 C.E.L.R.(N.S.) 169 (Ont. Prov. Ct.)

### **Application to General Defences**

Section 47(3), and particularly its burden of proof on a balance of probabilities, applies only to statutory exceptions. It does not apply to common law general defences such as necessity.

R. v. Walker (1979), 48 C.C.C. (2d) 126 (Ont. Co. Ct.)

Perka v. R. (1984), 14 C.C.C. (3d) 385 (S.C.C.)



The burden of proof for general defences is discussed in "Defences: General" and under specific defences in **General Principles and Defences**, *supra*.

### Reasonable Excuse

It seems that s. 47(3) applies to statutes that prohibit some activity unless the defendant has a "reasonable excuse". The onus is on the defendant to establish the "reasonable excuse" on a balance of probabilities.

R. v. Taraschuk (1973), 9 C.C.C. (2d) 345 (Ont. H.C.), affirmed on other grounds (1973), 12 C.C.C. (2d) 161 (Ont. C.A.), aff'd (1975), 25 C.C.C. (2d) 108, 30 C.R.N.S. 321 (S.C.C.)

R. v. Miller (1973), 10 C.C.C. (2d) 467, 21 C.R.N.S. 211 (Ont. H.C.)

### Charter Issues

It is currently unclear whether s. 47(3) violates s. 11(d) of the **Charter**. While the Ontario Court of Appeal held in 1985 that it does not, it is not clear if this case is still good law in light of more recent decisions of the Supreme Court of Canada.

The Supreme Court of Canada has held in a series of cases that a statutory provision that requires a defendant to disprove the existence of a presumed fact, or establish a defence, on the balance of probabilities violates s. 11(d) of the **Charter**, since it creates a possibility that the defendant may be convicted even though there may be a reasonable doubt as to guilt. Accordingly, such a provision can only stand if it can be saved by s. 1 of the **Charter**. It is irrelevant whether the matter that the defendant must prove or disprove goes to an element of the offence or a defence.

R. v. Oakes (1986), 24 C.C.C. (3d) 321 (S.C.C.)

R. v. Whyte (1988), 42 C.C.C. (3d) 97 (S.C.C.)

R. v. Keegstra (1990), 1 C.R. (4th) 129 (S.C.C.)

R. v. Chaulk (1990), 62 C.C.C. (3d) 193 (S.C.C.)

R. v. Wholesale Travel Group Inc. (1991), 67 C.C.C. (3d) 193 (S.C.C.)

R. v. Ellis-Don Ltd. (1992), 71 C.C.C. (3d) 63 (S.C.C.)

The Supreme Court has accepted in one decision that a statutory provision that requires a defendant to prove on a balance of probabilities that he was the holder of a certificate in order to escape liability did not violate s. 11(d) of the **Charter**. The court held that the statute did not create a "reverse onus", and there was no possibility of conviction despite a reasonable doubt as to guilt since all that a defendant had to do was to produce the certificate in order to "except" himself from liability.



R. v. Schwartz (1988), 45 C.C.C. (3d) 97 (S.C.C.)

The Ontario Court of Appeal, following a similar pattern of reasoning, has held that "s. 48(3) [now 47(3)] does not purport to create a presumption but rather to express in statutory form an exception to a general rule of pleading and proof on specific issues". It held that the section did not violate s. 11(d) since it did not involve a presumption. Even if there was a violation of s. 11(d), the section would be saved by s. 1 of the **Charter**.

R. v. Lee's Poultry Ltd. (1985), 17 C.C.C. (3d) 539 (Ont. C.A.)

R. v. Canadian Tire Corp. Ltd. (1987), 16 C.P.R. (3d) 465 (Ont. Dist. Ct.)

R. v. Horvath (1989), 10:4 Crim. Lawyers' Assn. Newsletter 27 (Ont. Prov. Ct.)

R. v. Daniels (1990), 60 C.C.C. (3d) 392 (B.C.C.A.)

B. Starkman "Section 48(3) of the Ontario Provincial Offences Act: Do We Presume It Creates a Presumption" (1990), 2 J.M.V.L. 233

It is doubtful whether the Ontario Court of Appeal's ruling in **R. v. Lee's Poultry Ltd.** can stand in view of the more expansive view of s. 11(d) in more recent Supreme Court of Canada decisions. While the Supreme Court of Canada has tried to rationalize **R. v. Schwartz** on the ground that it had to do with production of a "material thing" (a certificate or permit), this is unsatisfactory: what if the defendant claims that he had a certificate but lost it? More recent Supreme Court of Canada decisions suggest that it is only a matter of time before **R. v. Schwartz** is overruled. In any event, **R. v. Schwartz** only supports **R. v. Lee's Poultry Ltd.** where the statutory exception involves the proof of some document or tangible object, as opposed to the proof of circumstances.

It is submitted that s. 47(3) violates s. 11(d) of the **Charter** since it places the burden of proof on a defendant to establish an exception on a balance of probabilities. The issue will be whether this burden of proof on the defendant in the context of the particular statute can be justified under s. 1. This, of course, involves a statute by statute analysis.

It should be noted that the **Charter** violation arises because the persuasive burden falls on the defendant. Since the application of s. 47(3) is limited to exceptions, placing the evidential burden on the defendant (that is, requiring that there be some evidence that the exception might apply before the court considers the issue, rather than requiring the Crown to disprove the exception as part of its case in chief) does not violate s. 11(d) of the **Charter**. Accordingly, the **Charter** issue need only be addressed where there is some evidence before the court but not sufficient to establish the exception on a balance of probabilities. Where there is no evidence before the court of the exception, s. 11(d) is not violated.

## HEARSAY

### Introduction

The hearsay rule, together with its exceptions, is probably the most important and complex exclusionary rule in the law of evidence. The complexity arises because not all out-of-court statements are hearsay. It is the purpose for which evidence is tendered which determines whether it will be hearsay. It is only when the statement is put forward as proof of the truth of its contents that the rule against hearsay will exclude it unless an applicable exception can be found.

Hearsay issues are not always easy to analyze. As a matter of practice, whenever counsel knows that some statement made out of court (whether oral or written) will form part of his or her case, counsel should consider before trial whether the statement is hearsay and, if so, whether there is an exception to the rule that allows it to be admitted. Similarly, whenever the defendant seeks to introduce evidence of an out-of-court statement (whether oral or written) the Crown should consider whether the statement is hearsay, whether there is an applicable exception, and whether counsel should object if the statement is inadmissible.

The following sections discuss the rule and some of its exceptions. Hearsay exceptions that apply particularly to documentary evidence are discussed in "Documentary Evidence", *supra*. Hearsay issues that arise when an expert witness is giving the factual basis for his or her opinion are discussed in "Opinion Evidence", *infra*. The res gestae exception to the rule is discussed in a separate section, *infra*.

### A Note on Terms

The term "declarant" is commonly used when analysing hearsay problems to denote the person who makes the out-of-court statement in issue.

### Definition

The following definition, without being exhaustive, illustrates the scope and operation of the rule against hearsay.

...evidence of a statement made to a witness by a person who is not himself called as a witness is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement; it is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

R. v. O'Brien (1977), 35 C.C.C. (2d) 209 (S.C.C.) at 211  
Subramaniam v. Public Prosecutor, [1956] 1 W.L.R. 965 (P.C.)  
R. v. Smith (unreported, S.C.C., August 27, 1992)

It is clear from this definition that the rule against hearsay requires a consideration of two matters: the *source* of the information and the *purpose* for which it is being adduced. For example, evidence that the defendant was told by a third person that he would be shot if he did not assist the third person is hearsay and inadmissible to prove that the third person would shoot him if he did not assist. It is not hearsay and is admissible, however, if it is adduced to show the defendant's fear of the consequences if he did not assist the third person. On the latter issue, the truth or falsity of the statement is irrelevant: the court need only concern itself with whether the statement was made.

### Rationale for the Rule

The rationale for the rule lies in the so-called "hearsay dangers". Where evidence is given under oath (or affirmation) in court, the perception, memory, recall, and credibility of the person making the statement can be tested by cross-examination. This permits the weight to be given to the evidence to be fairly assessed by the trier of fact. Where a hearsay statement is admitted, there is no opportunity to explore the many possible sources of inaccuracy and untrustworthiness, since the maker of the statement was not under oath and cannot be cross-examined.

R. v. Smith (unreported, S.C.C., August 27, 1992)

This explains why the hearsay rule only applies to statements adduced for the truth of their contents. When the only issue is whether or not the statement was made, it is the perception, memory, recall, and credibility of the witness who claims to have heard the statement that is crucial.

Of course, this rationale does not justify the exclusion of all hearsay evidence. Rather, it suggests that the court should consider whether the circumstances surrounding the making of the statement are a sufficient guarantee of its accuracy and trustworthiness. Recent cases, discussed below in "New Exceptions", have recognized this.

## Application of the Rule

The hearsay rule applies to cross-examination as well as examination in chief. Hearsay evidence given during cross-examination is not admissible unless an exception to the rule is available.

R. v. Lavery (No. 2) (1979), 47 C.C.C. (2d) 60 (Ont. C.A.)

Generally, the rule against hearsay applies to the defence as well as to the Crown. Evidence led by the defence must not infringe the rule against hearsay, or must fit within an exception to the rule.

R. v. Williams (1985), 18 C.C.C. (3d) 356 (Ont. C.A.), leave to appeal to S.C.C. refused *ibid*

See "Constitutional Issues", below, for a discussion of circumstances where this principle may be relaxed.

## Admissibility for Limited Purpose

Evidence may be inadmissible hearsay if tendered for one purpose but admissible for some other purpose. For example, when a witness testified that he had heard that the defendant was looking for him in order to kill him, this was admissible to explain why the witness was carrying a gun, but inadmissible to prove that the defendant was in fact looking for him to kill him. In such circumstances, the trier of fact must be directed that the evidence may only be used for its non-hearsay purpose.

R. v. Cole (1980), 53 C.C.C. (2d) 269 (Ont. C.A.)

## Conduct as Hearsay

An act or gesture by a declarant that is intended to assert some matter is hearsay if adduced through a witness as evidence of that matter. For example, when an assault victim who subsequently died was asked if a certain person had assaulted her and nodded her head affirmatively, the nod was hearsay.

Chandrasekera v. R., [1937] A.C. 220 (P.C.)

R. v. McKinnon (1989), 70 C.R. (3d) 10 (Ont. C.A.)

However, the hearsay rule is limited (at least in Ontario) to conduct by which the declarant intended to assert some matter. Acts that are not intended to be assertive of a particular matter are not hearsay. For example, evidence from police officers that the wife of a person accused of murder was present when the victim's body was discovered at a remote location in the bush was not hearsay. The wife did not (and could not) testify as a Crown witness. The defence argued that the evidence that she was present



when the body was discovered was equivalent to an admission by her that she had been told the location by her husband and had led the officers there and that the police officers could not testify that the wife had told them that her husband told her where the body was. The Ontario Court of Appeal held that hearsay by conduct was limited to conduct intended by the declarant to convey some message. The wife's presence at the scene was not intended to be assertive and was not hearsay.

R. v. McKinnon (1989), 70 C.R. (3d) 10 (Ont. C.A.)

See also the discussion of "Implied Assertions", below.

### **Implied Assertions**

One of the most difficult types of statement to classify as hearsay or non-hearsay is the so-called "implied assertion". The problem arises where a witness reports a declarant's statement (made orally or by conduct) that does not directly assert some matter in issue, but is evidence of some state of mind on the part of the declarant that is circumstantial evidence of a matter in issue. For example, during a police raid on a suspected drug trafficker's home a number of persons come to the door. Clearly, a police officer cannot give evidence that those persons said "the man who lives here sold drugs to me" in order to prove that the occupant was a trafficker. But can the officer give evidence that the persons who came to the door said "here's my money, where's my cocaine" or "I'd like my usual amount"? The potential hearsay problem arises because the evidence is not being adduced simply to prove the declarant's state of mind. Rather, the trier of fact is being asked to draw an inference from that state of mind in order to prove some matter in issue in the case.

There is no clear answer whether or not such statements are hearsay. The main argument for classifying them as hearsay is that they are in substance no different from a direct assertion, to which the hearsay rule would apply. The main argument for classifying them as non-hearsay and admissible is that the hearsay rule should only apply to statements that give rise to the hearsay dangers and the dangers (particularly that of fabrication) are much less serious with implied assertions than with direct.

In England, implied assertions are considered to be hearsay and are inadmissible unless an applicable exception can be found.

Wright v. Tatham (1837), 7 E.R. 559 (H.L.)

R. v. Kearley, [1992] 2 W.L.R. 656 (H.L.)

In Canada, conduct (as opposed to oral statements) that is not intended to be assertive is not hearsay. Accordingly it is admissible.

R. v. McKinnon (1989), 70 C.R. (3d) 10 (Ont. C.A.)

As well, oral statements like those in the example that implicitly assert that the defendant is carrying on some illegal business (such as narcotics trafficking or betting) are not hearsay and are admissible.

R. v. Fialkow, [1963] 2 C.C.C. 42 (Ont. C.A.)

Silvestro v. R. (1964), 45 C.R. 76 (S.C.C.)

R. v. Cook (1978), 10 B.C.L.R. 84 (B.C.C.A.)

Since there seems to be little reason to distinguish between acts that impliedly assert some matter and conduct that impliedly asserts some matter, or to limit non-hearsay implied assertions to a limited class of cases, it may be argued that implied assertions generally are not classified as hearsay in Canadian law.

As a practical matter, it may make very little difference whether implied assertions are classified as hearsay or non-hearsay. If non-hearsay, the statements are admissible subject to the court's discretion to exclude evidence whose prejudicial effect exceeds its probative value (see "Relevance", *infra*). If hearsay, the statement may be adduced through the general hearsay exception for necessary and reliable evidence (see "New Exceptions", below). Since the focus is on probative value, it is likely that the evidence admitted will be broadly the same under either categorization.

## Negative Matters

The hearsay rule applies to statements of negative matters as well as positive matters. For example, where the issue was whether a particular item was sold by a retail business, the manager's evidence that he examined the store's records and found a record of a sale would be hearsay if offered to prove that an item had in fact been sold. Similarly, the manager's evidence that he found no record of a sale is hearsay if offered to prove that there had been no such sale. In both cases, the statements (or lack of them) by out-of-court declarants are being offered for their truth.

R. v. Garifoli (1988), 41 C.C.C. (3d) 97, 64 C.R. (3d) 193 (Ont. C.A.),  
rev'd on other grounds (1990), 60 C.C.C. (3d) 161 (S.C.C.)

R. v. Gould (1990), 57 C.C.C. (3d) 500 (B.C.C.A.)

(See the discussion of business records in "Documentary Evidence", *supra*, for exceptions to the rule that may apply to such records.)

However, evidence that a system was in place to ensure that a particular document would have been forwarded to the witness if it was sent to his place of work, and that he had received no such document, is admissible if offered to prove that no document was sent. The evidence is not hearsay, since no assertion of other parties is involved. (or, at most, an admissible implied assertion is being made).

R. v. King (1991), 108 N.S.R. (2d) 145 (N.S. Co. Ct.)



## Reasonable Grounds

Witnesses may give evidence as to what they were told by other persons when that information formed the reasonable grounds for the subsequent actions of that witness. The declarant's words are not being adduced to prove their truth, but merely to show what information the witness had. Accordingly, the evidence is not hearsay.

*Eccles v. Bourque* (1974), 19 C.C.C. (2d) 129 (S.C.C.)

*R. v. Strongquill* (1978), 43 C.C.C. (2d) 232 (Sask. C.A.)

*Collins v. R.* (1987), 33 C.C.C. (3d) 1 (S.C.C.)

For example, a police officer may testify that when he came upon the scene of an accident a third person pointed out the defendant as the person who had been driving the vehicle. This evidence is *not* admissible to prove that the defendant was driving, but is admissible to prove the officer's reasonable to believe that the defendant was driving (a prerequisite for a breathalyzer demand). Direct evidence, such as the evidence of the third person or an admission by the defendant, would be needed to prove that the defendant was in fact the driver.

## Use of Interpreters

Where an otherwise admissible statement is taken out of court through an interpreter, the use of the interpreter does not make the statement of the witness hearsay. The person who took the statement through the interpreter may give evidence as to the contents of the statement, provided that there is evidence that the statement is accurate.

*R. v. Kores* (1970), 15 C.R.N.S. 107 (B.C.C.A.)

## Prior Statements

A witness who has given a prior statement inconsistent with his evidence at trial may be cross-examined on that statement. If he denies making the statement, it may be proved in evidence. However, subject to recent exceptions, unless the witness adopts the contents of the statement, it is only admissible to show the inconsistency. The statement is hearsay, since it was made out of court, and is not admissible as proof of the truth of its contents.

*Wawanesa Mutual Ins. Co. v. Hanes*, [1961] O.R. 495 (Ont. C.A.)

*R. v. Bevan* (1991), 63 C.C.C. (3d) 333 (Ont. C.A.)

See "Cross-Examination", *supra*, for the procedure for cross-examination on prior inconsistent statements. The special principles are discussed in "Admissions by Party", below.

Recently, however, the Supreme court has ruled that in certain circumstances, prior statements may be proved and used as proof of their contents.

The criteria for admissibility are:

- (1) The statements are admissible only if they would have been admissible if made by the declarant in court. If a witness would not have been able, by virtue of the Charter or the rules of evidence to make the statement at trial, the new rule does not make the evidence admissible.
- (2) There must be circumstantial guarantees of trustworthiness. Ideally the evidence should be taken on videotape, under oath, and a warning given as to the possibility of prosecution under ss. 137, 139 and 140 of the Criminal Code. The court left open the possibility that other forms of statements might be reasonable substitutes for videotape, such as an audio tape with independent evidence of the declarant's demeanour.
- (3) While the court did not require the unavailability of the declarant, the "necessity" requirement is met in that the declarant has recanted his or her prior statement.

A *voire dire* should be held to determine the admissibility of the statements, with the judge retaining a discretion to exclude if he or she finds that the statement was not made voluntarily.

Generally, prior consistent statements by a witness are also inadmissible as hearsay, whether elicited through that witness or through other witnesses. There is, however, a series of exceptions to this principle, including where it is alleged that the witness has recently fabricated the statement, or where the statement is admissible as part of the *res gestae*.

R. v. Jones (1988), 44 C.C.C. (3d) 248, 66 C.R. (3d) 54 (Ont. C.A.)

R. v. Langille (1990), 59 C.C.C. (3d) 544 (Ont. C.A.)

See also the discussion of pre-trial identification, below.

### **Non-Hearsay Use of Words**

In addition to the examples noted above, there are numerous other instances where witnesses may give evidence of words spoken to them in order to prove some matter other than the truth of those words. The following are simply examples where evidence of words spoken does not offend the rule against hearsay.

The contents of a phone conversation between a witness and another person were admissible to prove the identity of the other person and that she was alive at the time of the call. The conversation contained things that only the particular person could know.

R. v. Ferber (1987), 36 C.C.C. (3d) 157 (Alta. C.A.),  
leave to appeal to S.C.C. refused *ibid*

Evidence of words spoken to the defendant was not hearsay when the words were not tendered to prove the truth of their contents, but merely to show the defendant's source for certain information.

R. v. Wildman (1981), 60 C.C.C. (2d) 289 (Ont. C.A.), reversed on  
other grounds (1984), 14 C.C.C. (3d) 321 (S.C.C.)

### Common Law Exceptions to the Hearsay Rule

Hearsay evidence is not admissible unless it falls within an exception to the rule. Historically, the common law has developed a series of these exceptions. As well, statutory provisions have created a series of further exceptions (particularly for documentary evidence). While the trend in the past has been to pigeonhole hearsay evidence into narrow exceptions covering particular circumstances, more recent cases have focused on the principles behind the hearsay rule and have developed new exceptions in accordance with these principles.

There are two principles behind hearsay exceptions: necessity and reliability. The necessity criterion recognizes that when the court is faced with a choice between admitting hearsay and having no evidence whatsoever on some point, the interests of truth and justice may be better served by admitting the evidence in the proper circumstances rather than adhering to a blanket rule of exclusion. The reliability criterion recognizes that the circumstances under which a statement is made may provide a sufficient degree of trustworthiness to justify its admission, even though the evidence was not given under oath and there is no opportunity to cross-examine.

R. v. Khan (1990), 59 C.C.C. (3d) 92 (S.C.C.)

R. v. Smith (unreported, S.C.C., August 27, 1992)

Some specific exceptions are discussed below. This list is not exhaustive, but covers those exceptions most likely to be useful in prosecutions under the **Provincial Offences Act**. The broad exception recently recognized by the Supreme Court of Canada is discussed in "New Exceptions", below.

## Admissions by Party

Statements made out of court by a *party* to a judicial proceeding (as opposed to a witness) are an exception to the rule against hearsay. Evidence of such statements may be adduced by the *opposite party* to prove the truth of their contents.

The same rule applies to criminal cases. The Crown may adduce evidence of a statement made by the defendant outside the courtroom as proof of the truth of its contents.

R. v. Schmidt (1948), 92 C.C.C. 53 (S.C.C.)

R. v. Mannion (1986), 28 C.C.C. (3d) 544 (S.C.C.)

R. v. Streu (1989), 48 C.C.C. (3d) 321 (S.C.C.)

There are limitations. Statements by the defendant to persons in authority are subject to the limitations on confessions discussed in "Statements", *infra*. As well, evidence given by the defendant in a prior judicial proceeding is subject to s. 13 of the **Charter** and is only admissible as a previous inconsistent statement. It is not evidence of the truth of its contents.

R. v. Mannion (1986), 28 C.C.C. (3d) 544 (S.C.C.)

R. v. Kuldip (1990), 61 C.C.C. (3d) 385 (S.C.C.)

This exception applies even when the defendant has only indirect knowledge of the truth of the contents of the statement. For example, a statement by the defendant that "I know that the tires are stolen because my buddy told me that they were" is admissible on a charge of possession of stolen property as evidence that the tires were in fact stolen. The weight to be given to the evidence is a matter for the trier of fact.

R. v. Streu (1989), 48 C.C.C. (3d) 321 (S.C.C.)

The Supreme Court justifies this on the basis that "presumably...the party making the statement has satisfied himself or herself as to the truth or the reliability of the statement or at least had the opportunity to do so".

One court has suggested that this exception also applies to statements of a victim, since he or she is "in the position of a party", so that the statements may be adduced for the truth of their contents by the defendant.

R. v. Grant (1989), 49 C.C.C. (3d) 410 (Man. C.A.)



This seems, in principle, wrong. Defendants will rarely make false inculpatory statements. On the other hand, there is no guarantee that the interests of the victim will always coincide with the interests of justice throughout the time between the offence and the trial. Accordingly, there is no guarantee of trustworthiness to any statements that he or she may make about the offence. A classic example is domestic assault, where false recantations by the victim are common.

This exception also covers so-called "adoptive admissions", where the defendant by words or conduct adopts the statement of a third party as being true.

R. v. Moore (1984), 15 C.C.C. (3d) 541 (Ont. C.A.), leave to appeal to S.C.C. refused *ibid*

R. v. MacDonald (1990), 54 C.C.C. (3d) 97 (S.C.C.)

A statement is not automatically admissible for the truth of its contents simply because the defendant was present when it was made. There must be some adoption of the statement by the defendant.

R. v. Dubois (1986), 27 C.C.C. (3d) 325 (Ont. C.A.)

However, the silence of a defendant who is confronted by an accusation of a third party that the defendant might reasonably be expected to deny if it were not true may constitute an acknowledgement of the truth of the assertion. The court must consider all the circumstances to determine whether the silence amounts to an admission.

R. v. Eden, [1970] 3 C.C.C. 280 (Ont. C.A.)

R. v. Conlon (1990), 1 O.R. (3d) 188 (Ont. C.A.)

This does not apply where the accusation is made by, or in the presence of, a police officer. Since a person has the right to remain silent when confronted in such circumstances, no inference can be drawn from the exercise of that right.

R. v. Eden, [1970] 3 C.C.C. 280 (Ont. C.A.)

R. v. Baron and Wertman (1976), 31 C.C.C. (2d) 525 (Ont. C.A.)

R. v. Conlon (1990), 1 O.R. (3d) 188 (Ont. C.A.)

As well, admissions made by an agent of the defendant acting within the scope of his or her authority or employment are admissible against the defendant.

R. v. Strand Electric Ltd., [1969] 2 C.C.C. 264 (Ont. C.A.)

R. v. McNamara (No. 1)(1981), 56 C.C.C. (2d) 193 (Ont. C.A.); *affd.* [1985] 1 S.C.R. 662

Where it is sought to adduce these, there must be admissible evidence that the agent was acting within the scope of his or her authority or employment in making the statement. The Crown may not use the admission itself to prove that making the statement was within the scope of the declarant's authority or employment.

R. v. Strand Electric Ltd., [1969] 2 C.C.C. 264 (Ont. C.A.)

### **Dying Declarations**

At common law, an exception to the hearsay rule allowed the statement of a dying person with a settled hopeless expectation of death to be admitted if that statement cast light on the circumstances leading to the declarant's impending death. However, the exception is only available where the death of the declarant is a legal element of the charge against the defendant.

R. v. Jurtyn (1958), 121 C.C.C. 403 (Ont. C.A.)

As a result, this exception has little application to proceedings under the **Provincial Offences Act**. For example, a dying declaration is not admissible on a charge of careless driving involving a fatality, since the fatality is not a legal element of the charge even though it arises out of the facts of the careless driving.

### **Statements about Contemporaneous Physical or Mental Condition**

Contemporaneous statements by a declarant as to their physical state are generally admissible as evidence of that state, although the declarant is not called as a witness.

Aveson v. Lord Kinnaird, (1805), 6 East 188 (K.B.)

### **Declarations of State of Mind or Intention**

Evidence of a statement made by a declarant to show his state of mind or intention is admissible to prove that state of mind or intention where the state of mind or intention is relevant to some issue in the case.

R. v. P.(R.)(1990), 58 C.C.C. (3d) 334 (Ont. H.C.)

R. v. Smith (unreported, S.C.C., August 27, 1992)

This exception to the hearsay rule is presumably based on the fact that a person's words are generally the only way of determining his future intentions.



For example, in a murder case where one issue was whether the deceased had been murdered or committed suicide, evidence of the deceased's stated intention to later do laundry and go out drinking were admissible. Such evidence was relevant to show the improbability of suicide.

R. v. Miller (1991), 68 C.C.C. (3d) 517 (Ont. C.A.)

Evidence that the deceased was planning to move in with a third party was admissible in a murder case to impeach the accused's story that the deceased had agreed to move in with him.

R. v. Delafosse (1988), 47 C.C.C. (3d) 165 (Que. C.A.)

However, statements by the declarant giving reasons for forming the state of mind or intention, or describing events that led to the state of mind or intention, are not admissible under this exception.

R. v. Baron von Lindberg (1977), 66 B.C.L.R. 277 (B.C.S.C.)

R. v. P.(R.)(1990), 58 C.C.C. (3d) 334 (Ont. H.C.)

As well, a statement of the declarant as to her state of mind may not be used as circumstantial evidence of the facts giving rise to that state of mind.

R. v. P.(R.)(1990), 58 C.C.C. (3d) 334 (Ont. H.C.)

R. v. Smith (unreported, S.C.C., August 27, 1992)

Statements of intention may also be used as circumstantial evidence that the declarant subsequently acted in accordance with the expressed intention where it is reasonable to infer that the declarant did so. The reasonableness of the inference will depend on all the circumstances of the case.

Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892)

R. v. P.(R.)(1990), 58 C.C.C. (3d) 334 (Ont. H.C.)

R. v. Smith (unreported, S.C.C., August 27, 1992)

For example, evidence that the declarant in a murder case intended to leave the accused, her boyfriend, was admissible to show that she did subsequently leave him, which in turn gave him a motive for murder.

R. v. P.(R.)(1990), 58 C.C.C. (3d) 334 (Ont. H.C.)

However, the declarant's statements are not admissible to prove the state of mind of persons other than the declarant, or to show that persons other than the declarant acted in accordance with the declarant's state of mind (unless perhaps there was some common intention or plan).

R. v. P.(R.)(1990) 58 C.C.C. (3d) 334 (Ont. H.C.)

R. v. Smith (unreported, S.C.C., August 27, 1992)

It has been suggested that this exception is limited to the intention to perform "acts of importance and significance" that "pervade the declarant's consciousness".

R. v. McKenzie (1986), 32 C.C.C. (3d) 527 (B.C.C.A.)

However, the courts in Ontario do not seem to construe the exception so narrowly.

R. v. Miller (1991), 68 C.C.C. (3d) 517 (Ont. C.A.)

### **Declarations Against Interest**

Courts have recognized that a statement by a declarant that expresses some matter against his or her interest is likely to be reliable, since people do not usually make false statements that are against their own interests. Accordingly, such statements are an exception to the hearsay rule and are admissible for the truth of their contents, provided that the prerequisites have been met.

R. v. O'Brien (1977), 35 C.C.C. (2d) 209 (S.C.C.)

It was formerly held that this exception was limited to statements that would expose the declarant to some financial liability ("declarations against pecuniary or proprietary interest"). At least in Canada, the exception now also covers statements that would expose the declarant to criminal liability ("declarations against penal liability").

The following prerequisites must be met before a declaration against either pecuniary or penal interest is admissible.

1. The declarant must have personal knowledge of the facts contained in the statement.
2. The statement must refer to the liability of the declarant, and not to the liability of some third party.
3. The statement must have been to the declarant's "immediate prejudice", in the sense that it must be clearly against his interest and must refer to a current, as opposed to a contingent or future, liability.

4. The declarant must be aware that the declaration is against his interest at the time that the declaration is made.

Lloyd v. Powell Duffryn Steamship Co., [1914] A.C. 733

Demeter v. R. (1977), 34 C.C.C. (2d) 137 (S.C.C.)

R. v. O' Brien (1977), 35 C.C.C. (2d) 209 (S.C.C.)

Where the declaration is against the declarant's penal interest, the following additional prerequisites must be met.

1. The declaration must be made to such a person, and in such circumstances, that the declarant would have apprehended an actual vulnerability to penal consequences.
2. The vulnerability to penal consequences must not be remote.
3. The statement as a whole must be against the declarant's penal interest.
4. In a case where there is some doubt as to whether the declarant's statement is true, the court may consider whether there are other circumstances which connect the declarant with the offence for which he claims responsibility (which would favour admissibility) or which connect the declarant with the defendant (which would not).

Demeter v. R. (1977), 34 C.C.C. (2d) 137 (S.C.C.)

R. v. O'Brien (1977), 35 C.C.C. (2d) 209 (S.C.C.)

R. v. Evans (1988), 45 C.C.C. (3d) 523 (B.C.C.A.), reversed on other grounds (1991), 63 C.C.C. (3d) 289 (S.C.C.)

For example, a statement made to a defendant's lawyer was inadmissible under this exception where criminal proceedings against the declarant for the offence had been stayed and the declarant was only willing to make a formal statement under the provisions of the **Canada Evidence Act** that would prevent the statement being used against himself. Since the statement was given under circumstances that were carefully designed *not* to expose the declarant to criminal liability, it was not admissible under this exception.

R. v. O'Brien (1977), 35 C.C.C. (2d) 209 (S.C.C.)

Similarly, a statement made by the declarant to a friend of his who was also a criminal was inadmissible, since there was no expectation that the statement would have penal consequences.

R. v. Evans (1988), 45 C.C.C. (3d) 523 (B.C.C.A.), reversed on other grounds (1991), 63 C.C.C. (3d) 289 (S.C.C.)

It was formerly held that this exception was only available where the declarant was dead, insane, too ill to testify, or outside the jurisdiction within which the court could compel attendance.

Demeter v. R. (1977), 34 C.C.C. (2d) 137 (S.C.C.)

R. v. O'Brien (1977), 35 C.C.C. (2d) 209 (S.C.C.)

This requirement has been relaxed somewhat. The exception is also available where the whereabouts of the declarant is unknown despite diligent efforts by the police to find him.

R. v. Pelletier (1978), 38 C.C.C. (2d) 515 (Ont. C.A.)

However, the exception is not available to admit statements for their truth if the declarant testifies, even if the declarant does not admit the truth of the statement while testifying. The statement may only be used as a prior inconsistent statement to cross-examine the declarant.

R. v. Williams (1985), 18 C.C.C. (3d) 356 (Ont. C.A.), leave to appeal to S.C.C. refused *ibid*

R. v. Lawrence (1989), 52 C.C.C. (3d) 452 (Ont. C.A.)

The exception is only available to admit statements that exculpate the defendant. It is not available to the Crown to admit statements that will inculpate the defendant.

Lucier v. R. (1982), 65 C.C.C. (2d) 150 (S.C.C.)

However, the Crown may be able to adduce inculpatory statements under the general exception discussed in "New Exceptions", below.

### **Evidence of Prior Identification**

Evidence of prior out-of-court descriptions of an offender given by an eyewitness is admissible at trial through a witness to whom the description was given, since the earlier identification evidence has greater probative value than identification evidence given in court. To the extent that the evidence is hearsay, it is an exception to the rule that would otherwise exclude it.

R. v. Swanston (1982), 65 C.C.C. (2d) 453 (B.C.C.A.)

R. v. Langille (1990), 59 C.C.C. (3d) 544 (Ont. C.A.)



As well, evidence that an eyewitness picked the offender out of an in-person or photographic line-up is admissible at trial, at least where the eyewitness testifies that the person they picked out was the offender. This evidence is admissible even if the witness is no longer able to make a positive identification in court.

R. v. Swanston (1982), 65 C.C.C. (2d) 453 (B.C.C.A.)

R. v. Langille (1990), 59 C.C.C. (3d) 544 (Ont. C.A.)

## **Evidence of Age**

See the annotation to sections 30(1),(2) and (8) of the **Liquor Licence Act** for a discussion of the hearsay exceptions applicable to proof of age.

## **Measuring Devices and Scientific Instruments**

On a strict interpretation, evidence of results obtained by devices used to make measurements of such matters as time, distance, speed and blood alcohol level is hearsay, since it involves a witness reporting a statement of an out-of-court declarant (the measuring device) for its truth. Nevertheless, courts have developed exceptions for such evidence, without always specifically addressing the hearsay issues involved.

Evidence of quantities measured by a mechanical device in everyday use (such as a watch or speedometer) that it is the purpose of that device to measure is admissible without the necessity of proof that the device is operating accurately.

Nicholas v. Penny, [1950] 2 K.B. 466 (Div. Ct.)

R. v. Bland (1974), 20 C.C.C. (2d) 332 (Ont. C.A.)

R. v. King (1977), 35 C.C.C. (2d) 424 (Ont. Div. Ct.)

However, the device must have measurement as its purpose. Evidence of distance measured by a chain indicated by the manufacturer to be two hundred feet long was inadmissible where there was no indication that the chain was designed to measure distance.

R. v. King (1977), 35 C.C.C. (2d) 424 (Ont. Div. Ct.)

Evidence of results measured by a scientific instrument operated by a person trained in its use are admissible if the instrument is capable of making the required measurements, was in good working order at the relevant time, and was properly used.



It is not necessary to call expert witnesses to explain how the machine operates or to prove its capability or accuracy (although such evidence, or its lack, may affect the weight to be given to the evidence).

R. v. Grainger (1958), 120 C.C.C. 321, 28 C.R. 84 (Ont. C.A.)

R. v. Redmond (1990), 54 C.C.C. (3d) 273 (Ont. C.A.)

The particular issues that arise when radar speed measuring devices are used are discussed in the annotations to s. 130 of the **Highway Traffic Act**.

### **Observations Recorded by Others: The "Licence Plate Problem"**

The hearsay issues that arise when a declarant gave information to a witness, the declarant testifies at trial that the information that he gave to the witness was accurate, the declarant can no longer recall the specific information given, and the witness seeks to give the evidence at trial, are discussed in "Refreshing Memory", *infra*. (The issue often arises when an eyewitness gives a licence plate number to a police officer who makes a note of it: can the officer give the plate number in evidence?)

### **Constitutional Exceptions**

Generally, a defendant's right to make full answer and defence implicit in s. 7 of the **Charter** only extends to the right to make full answer and defence in accordance with the established rules of evidence. Accordingly, s. 7 generally is not available to the defendant to allow the admission of hearsay evidence that would otherwise be excluded. This rule is not absolute, however. Section 7 permits the court to relieve against the strict operation of the hearsay rule in the rare instance where it is necessary in order to ensure a fair trial.

R. v. Williams (1985), 18 C.C.C. (3d) 356 (Ont. C.A.), leave to appeal to S.C.C. refused *ibid*

R. v. Rowbotham (1988), 41 C.C.C. (3d) 1 (Ont. C.A.)

Since it is based on the **Charter**, this exception is only available to the defence and not to the Crown. Its scope will no doubt be limited even further by the new general exception to the hearsay rule discussed below.

## New Exceptions

The Supreme Court of Canada has now radically reformulated the rules governing the admissibility of hearsay. The court has rejected the former categorical approach in favour of a new "general exception" based on the rationale for the rule against hearsay itself that permits hearsay evidence that is both "necessary" and "reliable".

The necessity criterion refers to the unavailability of the declarant. Necessity is not limited to circumstances where the declarant is dead, insane, or out of the jurisdiction of the court. It also includes the situation where the declarant is incompetent to testify or (at least with children) where testifying could cause the witness great emotional harm.

The reliability criterion considers whether the circumstances under which the statement was made provide a sufficient guarantee of trustworthiness to make it admissible, notwithstanding that the statement was not made under oath and cross-examination will not be available. It is clear that the test is not absolute certainty, but some lower threshold.

Courts must consider these two criteria in determining whether hearsay evidence that does not fit within one of the traditional exceptions should be admitted.

R. v. Khan (1990), 59 C.C.C. (3d) 92 (S.C.C.)

R. v. Smith (unreported, S.C.C., August 27, 1992)

Two preliminary points should be made about this new exception. First, it appears from **Smith** that the Supreme Court of Canada is adding to the traditional exceptions rather than replacing them, although some portions of the reasons for judgment may be read the other way. Second, while the Supreme Court has recognized this new exception, its scope and operation are still very much open to clarification. Counsel should be wary of relying too much on this new "general exception" until some idea of its interpretation is given by the appellate courts.

## IDENTIFICATION

### Introduction

In every case, the Crown must prove that the defendant before the court was the person who committed the offence. Identity, like any other issue, may be proved by either direct or circumstantial evidence, or by a combination of both.

It is good practice to ask all eye witnesses if they can see the person who committed the offence in the courtroom (after counsel has laid the proper foundation, if there is any real issue as to identity) and, if they can, to have them point him out. The Crown should state this for the record, if defence counsel does not acknowledge

### A Note on Terms

In this section, "offender" refers to the person who commits the offence. "Defendant" refers to the person who comes to court to answer to the charge (personally or by counsel or agent), or who fails to appear in circumstances where the court may proceed *ex parte*.

### Proving Defendant Was Person Charged

Proving identity may simply involve calling a witness who can testify that the defendant before the court is the person who committed the offence. Occasionally, however, proving identity involves two steps: proving that the person who was apprehended at the time of the offence was the person who committed the offence, and proving that the defendant before the court is the person who was apprehended at the time of the offence. This two-step process arises frequently in provincial offences. The police officer can testify to apprehending and charging the person who committed the offence, and can give the name and address that the offender gave at the time, but due to the passage of time and the volume of charges cannot say that the defendant before the court is the offender.

This problem can arise in one of three forms: where the defendant is present at trial, where the defendant is not present but is represented by counsel or an agent, and where the matter proceeds *ex parte*. These different situations are discussed below. Of course, this issue does not arise where there is direct evidence that the defendant was the offender.

Where a person identifies himself by name to a police officer at the time he is apprehended, and the defendant subsequently appears in court to answer to the charge, the similarity of names is some evidence that the defendant is the person who was apprehended.

R. v. Chandra (1975), 29 C.C.C. (2d) 570 (B.C.C.A.)

The weight to be given to the evidence depends upon the circumstances. The weight of the evidence is strengthened where the name is relatively distinct, similarity of name is coupled with an address, or the offender identified himself by a licence or some other official document.

R. v. Longmuir (unreported, Ont. C.A., Sept. 8, 1982)

R. v. Chandra (1975), 29 C.C.C. (2d) 570 (B.C.C.A.)

Re Brown and R. (1975), 30 C.C.C. (2d) 300 (Ont. H.C.)

R. v. MacLean (1973), 11 C.C.C. (2d) 568 (N.S.Co.Ct.)

R. v. Lively, [1970] 3 C.C.C. 119 (N.S.Co. Ct.)

In every case, it is a question of fact whether the evidence is sufficient to raise a *prima facie* case upon which the court may convict in the absence of evidence that the defendant is not the person apprehended at the time of the offence (or, in other words, whether the evidence is sufficient to raise a presumption of identity).

Under the **Provincial Offences Act**, there is *prima facie* evidence of identity where the offender identifies himself with a driver's licence and signs the certificate of offence, the officer gives the name in court, the charge is against a person of the name and address of the offender, and the defendant does not dispute that he is the person named in the charge.

R. v. Hunt (1986), 18 O.A.C. 78 (Ont. C.A.)

However, the decision does not imply that all these elements (full name, licence, address) must be present to establish a *prima facie* case.

An identification by name and address, supported by an ownership permit for the car being driven, is sufficient to raise the presumption that the defendant was the offender.

Re Brown and R. (1975), 30 C.C.C. (2d) 300 (Ont. H.C.)



Evidence that the name of the person stopped was "George Robert MacLean", without any address, was held to be insufficient evidence that the person apprehended was the defendant where all three names were common in the area.

R. v. MacLean (1973), 11 C.C.C. (2d) 568 (N.S.Co.Ct.)

Minor discrepancies in name or address will not necessarily displace the presumption of identity. These matters go to the weight of the evidence of identity. A signature on an appearance notice by the offender in the form "D.B. Taylor" will not displace a *prima facie* case of identity where the full name "Douglas Bertrand Taylor", together with an address, appears both elsewhere on the appearance notice and in the information.

R. v. Taylor (unreported, Ont. Prov. Ct.)

A change of address between the time the person was apprehended and the time the matter comes to court will not affect the presumption where the court was notified by the offender of the change of address.

R. v. Hunt (1986), 18 O.A.C. 78 (Ont. C.A.)

However, a *prima facie* case was not made out where the information charged a "John Francis Murphy" of "Marystown" but the evidence at trial was that the offender (who did not appear) was "John Murphy" of "Winterland".

R. v. Murphy (1983), 42 N.P.E.I.R. 175 (Nfld. Dist. Ct.)

The fact that the officer is unable to identify the defendant in the courtroom, or even identifies some other person as the offender, will not necessarily displace the presumption of identity. Dock identifications, here as elsewhere, are inherently frail.

Lawless v. R. (1981), 11 M.V.R. 296 (P.E.I.S.C.)

R. v. Nicholson (1984), 12 C.C.C. (3d) 228 (Alta. C.A.)

Where the defendant does not appear, but counsel or an agent appears for him, it is understood (in the absence of some evidence to the contrary) that counsel or the agent appears for the person named in the information, and on his instructions. Where the evidence is sufficient to establish that the offender is the person named in the information, counsel may not argue against conviction on the basis that their client is not the person named in the information.

R. v. Fedoruk, [1966] 3 C.C.C. 118 (Sask. C.A.)

R. v. Boyle (1975), 23 C.C.C. (2d) 379 (Sask. Q.B.)

R. v. Meikle, [1979] 1 W.W.R. 460 (Alta. Prov. Ct.)



Counsel may, of course, argue that the evidence is insufficient to establish that the offender was the person who is named in the information.

Where the defendant has been properly served with some form of process but has failed to appear, and trial is held *ex parte*, the principles governing the presumption of identity apply. The schemes permitting trial *ex parte* ensure that the person named in the information is given notice of trial and an opportunity to attend. If he fails to do so, and the court is satisfied that the person named in the information is the person who was apprehended, it may convict. It is not open to the defendant to argue on appeal that the Crown has failed to establish that he was the person named in the information.

Re Brown and R. (1975), 30 C.C.C. (2d) 300 (Ont. H.C.)

### **Description as "Defendant"**

Where a witness giving evidence describes the person who committed the offence as "the accused" (or, more correctly, "the defendant"), but does not specifically indicate the defendant before the court, the court may infer that the witness is referring to the defendant before the court, and hold that identity has been established.

R. v. Ross (unreported, Ont. Co. Ct., Jan. 10, 1980, per Cartwright Co. Ct. J.)

However, a reference to "the accused" or "the defendant", without any other evidence such as a name that might raise the presumption of identity, is not sufficient where the defendant is not present and trial has proceeded *ex parte*. In these circumstances, there is no implicit recognition of the defendant before the court as being the offender.

R. v. Murphy (1983), 42 N.P.E.I.R. 175 (Nfld. Dist. Ct.)

### **Direct Identification of Offender**

Courts have recognized that there is a real danger of wrongful conviction where the evidence linking the defendant to the offence is solely or primarily eyewitness identification. Even where the eyewitness is honest and is convinced of the correctness of the identification, there is no guarantee that the evidence is reliable.

R. v. D.(A.) (1990), 37 O.A.C. 267 (Ont. C.A.)

R. v. Izzard (1990), 54 C.C.C. (3d) 252 (Ont. C.A.)

R. v. Quercia (1990), 60 C.C.C. (3d) 380 (Ont. C.A.)

Despite this danger, any frailties in an eyewitness identification go to the weight of the evidence, and not its admissibility. The weaknesses in the evidence do not directly affect its admissibility.

Mezzo v. R. (1986), 27 C.C.C. (3d) 97 (S.C.C.)

However, there may be circumstances where identification evidence is so weak, frail or tainted that it may be excluded under the **Charter** or, perhaps, under the common law discretion to exclude evidence whose prejudicial effect exceeds its probative value.

Mezzo v. R. (1986), 27 C.C.C. (3d) 97 (S.C.C.) per Wilson J. dissenting

See "Relevance", *infra*

(*Quaere* whether the discretion to exclude evidence on the ground that its prejudicial effect exceeds its probative value should apply where the only possible prejudice is that the trier of fact will use the evidence for its proper purpose but might give it too much weight, as opposed to the more usual situation where the potential prejudice stems from the danger that the trier of fact will use the evidence for some improper purpose.)

Generally, the weight of an eyewitness identification depends upon two sets of factors: the ability of the eyewitness to perceive and recall the offender's appearance, and the procedures used by the police and the Crown before and during trial to have the witness identify the defendant as the offender. These different factors are discussed below.

### Opportunity to Perceive and Recall

The factors that affect the ability of an eyewitness to perceive and recall an offender's appearance are largely matters of experience and common sense. The following factors, while illustrative, are not exhaustive.

Generally, the weight to be given to an eyewitness identification will depend on the conditions under which it is made, the care with which it is made, and the ability of the observer.

R. v. Smierciak (1946), 87 C.C.C. 175 (Ont. C.A.)

The amount of time that the eyewitness has to observe the offender is significant. An identification based on observations over a period of time is much stronger than a "fleeting glance".

R. v. Wedow (1983), 50 A.R. 26 (Alta. C.A.)

R. v. Izzard (1990), 54 C.C.C. (3d) 252 (Ont. C.A.)

R. v. Quercia (1990), 60 C.C.C. (3d) 380 (Ont. C.A.)

The light conditions at the time and place that the eyewitness sees the offender are also significant.

R. v. Browne and Angus (1951), 99 C.C.C. 141 (B.C.C.A.)

R. v. Corbett (1973), 11 C.C.C. (2d) 137 (B.C.C.A.)

Mezzo v. R. (1986), 27 C.C.C. (3d) 97 (S.C.C.)

R. v. Quercia (1990), 60 C.C.C. (3d) 380 (Ont. C.A.)

The mental state of the observer is a relevant consideration when assessing the weight to be given to an eyewitness identification. An identification is weakened where a witness only has a brief opportunity to observe the offender and during that time is surprised, startled or frightened.

R. v. Browne and Angus (1951), 99 C.C.C. 141 (B.C.C.A.)

R. v. Izzard (1990), 54 C.C.C. (3d) 252 (Ont. C.A.)

On the other hand, an observation is strengthened where an eyewitness carefully observes an offender for the specific purpose of being able to identify the offender later.

R. v. Quercia (1990), 60 C.C.C. (3d) 380 (Ont. C.A.)

This latter point can often be made where the witness is a police officer who observed an individual suspected of an offence. The fact that the officer's attention is directed specifically toward observing the individual strengthens the identification.

An eyewitness identification is significantly strengthened where the eyewitness knows the offender, or has some prior acquaintance with the offender.

R. v. MacKenzie (1979), 24 N.P.E.I.R. 363 (P.E.I.S.C.)

R. v. Todish (1985), 18 C.C.C. (3d) 159 (Ont. C.A.)

This holds true even if the witness has only seen the offender on one previous occasion.

R. v. Todish (1985), 18 C.C.C. (3d) 159 (Ont. C.A.)

This point is reinforced if counsel makes a point of referring to a "recognition" rather than an "identification".

An eyewitness identification is also strengthened if the offender has some distinctive feature or characteristic that the witness can describe.

R. v. Smierciak (1946), 87 C.C.C. 175 (Ont. C.A.)

R. v. Quercia (1990), 60 C.C.C. (3d) 380 (Ont. C.A.)

## Line-ups

While a line-up can provide strong evidence of identification, the line-up must be properly conducted. Generally, the other persons in the line-up should be similar to the defendant in age, build, race, complexion, costume, and all other relevant particulars.

R. v. Goldhar (1941), 76 C.C.C. 270 (Ont. C.A.)

R. v. Armstrong (1959), 125 C.C.C. 56 (B.C.C.A.)

R. v. Todish (1985), 18 C.C.C. (3d) 159 (Ont. C.A.)

It is improper for the defendant to be the only person in the line-up dressed in clothing similar to what the offender was described to be wearing.

R. v. Blackmore (1970), 2 C.C.C. (2d) 397 (Ont. C.A.), *aff'd ibid* at 514 (S.C.C.)

It is improper for an eyewitness to be shown a single person (the defendant) and asked if she can identify that person as the offender.

R. v. Smierciak (1946), 87 C.C.C. 175 (Ont. C.A.)

R. v. Todish (1985), 18 C.C.C. (3d) 159 (Ont. C.A.)

The Law Reform Commission of Canada has suggested guidelines for the conduct of police line-ups. While these guidelines are not binding, they are a useful statement of good practice.

Law Reform Commission of Canada Study Paper *Police Guidelines: Pre-Trial Eyewitness Identification Procedures* (Ottawa: L.R.C.C., 1983) at 120 - 147

## Photographs

Photographs may be used in several ways. Where police do not know the identity of the offender, eyewitnesses may be shown photographs of potential suspects to see if they can pick any person out. Where the police have a particular suspect, eyewitnesses may be shown a photographic line-up as an alternative to an "in-person" line-up. Both of these procedures are proper. However, it is improper to show photographs to eyewitnesses where the police have a particular suspect in custody and intend to have the eyewitness view an "in-person" line-up later.

R. v. Goldhar (1941), 76 C.C.C. 270 (Ont. C.A.)

R. v. Dean (1942), 77 C.C.C. 13 (Ont. C.A.)

R. v. Watson (1944), 81 C.C.C. 212 (Ont. C.A.)

R. v. Jarrett (1975), 25 C.C.C. (2d) 241 (N.S.C.A.),  
leave to appeal to S.C.C. refused *ibid*



Even when the procedure followed with the photographs is proper, the fact that the witness has previously identified a photograph of the defendant weakens the weight of any subsequent identification (such as a dock identification in the courtroom).

R. v. Goldhar (1941), 76 C.C.C. 270 (Ont. C.A.)

R. v. Sutton, [1970] 3 C.C.C. 152 (Ont. C.A.)

R. v. Jarrett (1975), 25 C.C.C. (2d) 241 (N.S.C.A.),  
leave to appeal to S.C.C. refused *ibid*

A description of the offender should be taken from an eyewitness before any photographs are shown. This ensures that the photographs will not taint the description.

R. v. Power (1987), 67 N.P.E.I.R. 272 (Nfld. S.C.T.D.)

It is highly improper for the police to show an eyewitness a single photograph and ask if the person in the photograph is the offender.

R. v. Smierciak (1946), 87 C.C.C. 175 (Ont. C.A.)

R. v. Sutton, [1970] 3 C.C.C. 152 (Ont. C.A.)

R. v. Babb (1971), 17 C.R.N.S. 366 (B.C.C.A.)

Where there is more than one eyewitness to an offence, the eyewitnesses should view any photographs separately from one another.

R. v. Opalchuk (1958), 122 C.C.C. 85 (Ont. Co.Ct.)

R. v. Armstrong (1959), 125 C.C.C. 56 (B.C.C.A.)

R. v. Zaversnuke (1982), 30 C.R. (3d) 273 (Man. Co.Ct.)

Where a photographic line-up is used, in addition to the principles governing similarity of subjects the apply to in-person line-ups, the photographs themselves should be similar in format.

R. v. Zaversnuke (1982), 30 C.R. (3d) 273 (Man

R. v. Zaversnuke (1982), 30 C.R. (3d) 273 (Man. Co.Ct.)

There should be no markings on the photographs indicating that particular persons are suspects, or that particular persons have been picked out by other eyewitnesses.

R. v. Power (1987), 67 N.P.E.I.R. 272 (Nfld. S.C.T.D.)



## Identification in Court

A "dock identification" (an identification in court of the defendant while he is seated at the counsel table or in the prisoner's dock) is of little weight unless the witness can describe the characteristics of the offender that enable the witness to identify the defendant as the offender.

R. v. Browne and Angus (1951), 99 C.C.C. 141 (B.C.C.A.)

R. v. Smith (1951), 103 C.C.C. 58 (Ont. C.A.)

While a dock identification without a description of characteristics has little weight, it is incorrect to describe it as "valueless". The weight to be given to it depends upon all the evidence (including any circumstantial evidence that supports the dock identification).

R. v. McKay and Bruner (1966), 61 W.W.R. 529 (B.C.C.A.)

The weight of a dock identification is significantly diminished if the identification is the result of leading questions from the Crown.

R. v. Williams (1982), 66 C.C.C. (2d) 234 (Ont. C.A.)

R. v. Boyle (1987), 81 N.B.R. (2d) 43 (N.B.Q.B.)

It is a matter for the court's discretion whether a defendant should be permitted to be seated in the body of the court to see if the witness can identify him there.

Re Conrad and R. (1973), 12 C.C.C. (2d) 405 (N.S.S.C.T.D.)

Dubois v. R. (1975), 29 C.R.N.S. 220 (B.C.S.C.)

Re R. and Grant (1974), 13 C.C.C. (2d) 495 (Ont. H.C.J.)

## Effect of Improper Identification Techniques

Improper identification methods can affect an eyewitness identification in one of two ways. First, they may weaken the identification to the point where the Crown has not proved identity beyond a reasonable doubt.

R. v. Smierciak (1946), 87 C.C.C. 175 (Ont. C.A.)

R. v. Izzard (1990), 54 C.C.C. (3d) 252 (Ont. C.A.)

Second, it seems that improper identification techniques may in some circumstances form the basis of an application for a stay on the basis of abuse of process, or a **Charter** application to either exclude evidence or stay the proceeding.

Mezzo v. R. (1986), 27 C.C.C. (3d) 97 (S.C.C.)

### Discrepancies in Description

Courts have recognized that eyewitnesses, and particularly victims of traumatic events, cannot be expected to observe and recall all salient features of an offender's appearance. As well, they cannot be expected to be completely accurate in recalling their observations.

R. v. Quercia (1990), 60 C.C.C. (3d) 380 (Ont. C.A.)

Nevertheless, the court must consider the description of the offender in its totality. A conviction may be unsafe where there is one significant discrepancy between the description of the offender and the defendant, even if there are numerous similarities.

R. v. D.(A.) (1990), 37 O.A.C. 267 (Ont. C.A.)

R. v. Quercia (1990), 60 C.C.C. (3d) 380 (Ont. C.A.)

### Circumstantial Evidence Supporting Identification

Eyewitness evidence should not be viewed in isolation. It must be considered along with all the other evidence to determine if identity has been proved beyond a reasonable doubt. Accordingly, any circumstantial evidence that confirms an eyewitness identification by linking the defendant to the offence is very significant.

R. v. Quercia (1990), 60 C.C.C. (3d) 380 (Ont. C.A.)

The types of circumstantial evidence that may link a defendant to an offence are virtually limitless. The following are examples only.

An admission by the defendant that he was present at the scene, but took no part in the commission of the offence, may strengthen an identification that standing alone would not suffice for conviction.

R. v. Cosgrove (1977), 34 C.C.C. (2d) 100 (Ont. C.A.)

R. v. Longaphy (1989), 93 N.S.R. (2d) 97 (N.S.C.A.)

An eyewitness identification is strengthened where the witness has correctly identified other persons as being present at the scene.

R. v. Cosgrove (1977), 34 C.C.C. (2d) 100 (Ont. C.A.)

There was circumstantial evidence to support an otherwise unsatisfactory identification where the defendants were similar in stature and dress to the offenders, drove a similar vehicle, and were in possession of money very similar in amount and denomination to the money taken during the robbery.

R. v. McKay and Bruner (1966), 61 W.W.R. 528 (B.C.C.A.)

Where an offence was committed by three persons together, only one of whom was positively identified, evidence that the two defendants were with the offender who was identified both before and shortly after the offence was admissible to support other evidence of identification.

R. v. Braumberger (1967), 62 W.W.R. 285 (B.C.C.A.)

### **Effect of Prior Failure to Identify**

A conviction may be unsafe where an eyewitness fails to identify the defendant as the offender despite a proper opportunity to do so (such as a line-up or photo line-up), even where the witness can identify the defendant at a later time.

R. v. Albert (1984), 4 O.A.C. 50 (Ont. C.A.)

R. v. Izzard (1990), 54 C.C.C. (3d) 252 (Ont. C.A.)

### **Expert Evidence on Identification Evidence**

Expert evidence on the effect of a stressful situation on the ability to perceive and recall the appearance of an offender is generally not admissible. The issue is one that falls within the scope of common experience, and any dangers can be alleviated by a proper charge to the trier of fact. There may, however, be exceptional circumstances where the evidence is useful and therefore admissible.

R. v. Audy (No. 2) (1977), 34 C.C.C. (2d) 231 (Ont. C.A.)

R. v. Martel, [1982] 5 W.W.R. 577 (B.C.S.C.)

### **Identification of Offender in Videotape**

Where a "crime in progress" videotape is admitted into evidence, the issue of whether the defendant is the person shown in the tape will arise. On this issue, the opinions of witnesses who were not previously familiar with the defendant are not admissible, since they are in no better position than the trier of fact (who can see the defendant in the courtroom). On the other hand, the evidence of a person who has known the defendant for some time and is familiar with his appearance and mannerisms, or who saw the defendant near the time of the offence and so was familiar with his appearance at that time, is admissible. Such a person is in a better position than the trier of fact to form an opinion on the identity issue.

R. v. Leaney (1987), 38 C.C.C. (3d) 263 (Alta. C.A.), var'd on other grounds (1989), 50 C.C.C. (3d) 289 (S.C.C.)

## Drawings

It seems that a drawing prepared by an artist from the description given by an eyewitness is admissible in evidence on the same principles that govern the admissibility of a prior oral description given by the witness, at least where the eyewitness agrees that the drawing accurately depicts the person they saw (see "Hearsay", *supra*, for the principles governing the admissibility of past description or identification). However, while the drawing may strengthen the identification made by the eyewitness because of its contemporaneity and detail, the trier of fact may not draw any inference that the defendant is the offender simply from the fact that the defendant resembles the drawing.

R. v. Sophonow (1986), 50 C.R. (3d) 193 (Man. C.A.)

R. v. Langille (1990), 59 C.C.C. (3d) 544 (Ont. C.A.)

## Voice Identification

Voice identification may have one of two purposes. Sometimes, the only concern is the identity of the speaker directly (such as the voice of a masked robber, or a person who makes a threat in a phone call). At other times, the Crown will seek to identify the voice in order to prove the contents of what was said against the speaker. While these two situations have different purposes, the principles governing identity are the same for both.

Evidence from a witness that they identified the offender's voice as being that of the defendant is admissible. The weight to be given to the identification will depend on all the circumstances.

R. v. Braumberger (1967), 62 W.W.R. 285 (B.C.C.A.)

R. v. Montani (1974), 26 C.R.N.S. 339 (Ont. Prov. Ct.)

Even if the recipient of a phone call is unable to identify the caller's voice, the voice can be identified circumstantially from the contents of the call itself.

R. v. Ferber (1987), 36 C.C.C. (3d) 157 (Alta. C.A.), leave to appeal to S.C.C. refused  
*ibid*

Where a phone call is placed to the defendant's phone number, and is answered by a person who identifies himself in the defendant's name, there is sufficient evidence that the defendant is the person speaking to make the conversation admissible against him.

R. v. Boland (1977), 33 C.C.C. (2d) 211 (Ont. C.A.)



As well, it seems that where a speaker in a recorded conversation identifies himself as the defendant, there is sufficient evidence of identity to make the conversation admissible against the defendant, at least where the speaker did not know that the conversation was being recorded.

R. v. Rowbotham (1988), 41 C.C.C. (3d) 1 (Ont. C.A.)

Where the offender's voice has been recorded, a person who has had the opportunity to hear the recordings numerous times may give an opinion that the voice is that of a defendant whom he has heard speak. While the person may have had no special training, his familiarity with the material makes his evidence admissible.

R. v. Rowbotham (1988), 41 C.C.C. (3d) 1 (Ont. C.A.)

R. v. Tarafa (1989), 53 C.C.C. (3d) 472 (Que. S.C.)

Spectrographic comparisons of the defendant's voice with the offender's voice (so-called "voiceprints") are admissible provided that a proper foundation has been laid.

R. v. Montani (1974), 26 C.R.N.S. 339 (Ont. Prov. Ct.)

R. v. Medvedew (1978), 43 C.C.C. (2d) 434 (Man. C.A.)

### **Other Methods of Identification**

Expert testimony that sample footprints of the defendant match footprints found at the scene is evidence to establish a *prima facie* case of identity.

R. v. Wadden (1986), 71 N.S.R. (2d) 253 (C.A.)

Expert testimony matching the defendant's fingerprints to those found at the scene is enough to establish the issue of identity.

McFadden v. R (1981), 22 C.R. (3d) 76 (B.C.C.A.)

### **Evidence of Prior Description or Identification**

The admissibility of a description given by an eyewitness on an earlier occasion, or an identification made by an eyewitness on an earlier occasion, is discussed in "Hearsay", *infra*.



**Identification and Res Gestae**

The admissibility of an identification made at or shortly after the time of the offence by a person who does not testify is discussed in "Res Gestae", *infra*.

## JUDICIAL NOTICE

### Introduction

Generally, a court may only make findings of fact based on evidence that has been led before it. The doctrine of judicial notice acts as an exception to this general rule, permitting a court to find a fact without having evidence of the matter led.

A second aspect of judicial notice is the issue of how far a court may (or must) take judicial notice of matters of law.

### The General Principle

A court may take judicial notice of matters of fact where those matters fall into one of two categories:

- (a) matters that are so generally known that they cannot reasonably be questioned; or
- (b) matters that can readily be determined or verified by resort to sources whose accuracy cannot reasonably be questioned.

R. v. Potts (1982), 66 C.C.C. (2d) 219 (Ont. C.A.), leave to appeal to S.C.C. refused *ibid*

R. v. Zundel (No. 1) (1987), 31 C.C.C. (3d) 97, 56 C.R. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused 80 N.R. 317n

A court has a wide discretion as to what it may judicially notice, provided that the matter falls into one of these two categories. However, the discretion must be exercised judicially.

R. v. Zundel (No. 1) (1987), 31 C.C.C. (3d) 97, 56 C.R. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused 80 N.R. 317n

R. v. Zundel (No. 2) (1990), 53 C.C.C. (3d) 161 (Ont. C.A.), reversed on other grounds [1992] 2 S.C.R. 731

It is not appropriate for a court to take judicial notice where doing so would resolve contentious issues of fact in dispute at the trial.

R. v. Zundel (No. 1) (1987), 31 C.C.C. (3d) 97, 56 C.R. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused 80 N.R. 317n

R. v. Zundel (No. 2) (1990), 53 C.C.C. (3d) 161 (Ont. C.A.), reversed on other grounds [1992] 2 S.C.R. 731

### Matters of General Knowledge

There are two different tests that may allow a matter to be judicially noticed on the ground that it is "so generally known that it cannot be reasonably questioned".

First, a court may take judicial notice of matters that are "known to intelligent persons generally" or that are "part of mankind's fund of common knowledge".

R. v. Potts (1982), 66 C.C.C. (2d) 219 (Ont. C.A.), leave to appeal to S.C.C. refused *ibid*

Reference re Alberta Legislation, [1938] S.C.R. 100, affirmed [1939] A.C. 117 (P.C.)

R. v. Cernuik (1947), 91 C.C.C. 56 (B.C.C.A.)

Second, a court may take judicial notice of a matter that is common knowledge in the community when and where the offence is being tried, even if it is not a matter known to "intelligent persons generally".

R. v. Potts (1982), 66 C.C.C. (2d) 219 (Ont. C.A.), leave to appeal to S.C.C. refused *ibid*

In Nova Scotia, the test seems to be whether the matter is common knowledge throughout the province, since the court trying the matter has jurisdiction throughout the province.

R. v. Kline (1988), 86 N.S.R. (2d) 53 (N.S.S.C.T.D.)

In Ontario, on the other hand, the test is whether the matter is common knowledge in the community in which the offence is being tried.

R. v. Potts (1982), 66 C.C.C. (2d) 219 (Ont. C.A.), leave to appeal to S.C.C. refused *ibid*

The test is the knowledge of the community, not the knowledge of the court. If a matter is common knowledge in the community, the court may take judicial notice even though the matter was not previously known to the court. Conversely, a court may have personal knowledge about some matter, but may not take judicial notice of the matter unless it is common knowledge in the community.

R. v. Potts (1982), 66 C.C.C. (2d) 219 (Ont. C.A.), leave to appeal to S.C.C. refused *ibid*

### Reference to Sources of Unquestioned Accuracy

A court may refer, or be referred by counsel, to "readily accessible sources of indisputable accuracy" and take judicial notice of matters set out in such sources.

R. v. Zundel (No. 1) (1987), 31 C.C.C. (3d) 97, 56 C.R. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused 80 N.R. 317n

A court may use established and recognized works of reference such as encyclopedias, dictionaries, atlases and maps.

R. v. Mallios (1978), 42 C.C.C. (2d) 441 (Que. S.C.)

R. v. Quinn (1975), 27 C.C.C. (2d) 543 (Alta. S.C.T.D.)

For example, it would have been appropriate to refer to a dictionary to determine whether "bighorn sheep" were "mountain sheep".

R. v. Quinn (1975), 27 C.C.C. (2d) 543 (Alta. S.C.T.D.)

As well, it was appropriate for a court to consult reference books and hear expert testimony before taking judicial notice that a camel was a "domestic animal".

McQuaker v. Goddard, [1940] 1 All E.R. 471 (C.A.)

### Procedure for taking Judicial Notice

In determining whether to take judicial notice of a matter, a court may make inquiries on the matter and may receive submissions from the parties. The court may also on its own motion consult sources of authority, or may be referred to them by the parties.

R. v. Zundel (No. 1) (1987), 31 C.C.C. (3d) 97, 56 C.R. (3d) 1 (Ont. C.A.),  
leave to appeal to S.C.C. refused 80 N.R. 317n

The court may even hear sworn testimony during the process of deciding whether to take judicial notice of the matter.

McQuaker v. Goddard, [1940] 1 All E.R. 491 (C.A.)

R. v. Zundel (No. 1) (1987), 31 C.C.C. (3d) 97, 56 C.R. (3d) 1 (Ont. C.A.),  
leave to appeal to S.C.C. refused 80 N.R. 317n

In the process of deciding whether to take judicial notice of some matter, the court is entitled to rely on hearsay evidence or receive expert opinions based on hearsay.

R. v. Zundel (No. 1) (1987), 31 C.C.C. (3d) 97, 56 C.R. (3d) 1 (Ont. C.A.),  
leave to appeal to S.C.C. refused 80 N.R. 317n

In some provinces, it seems that a court is required to take judicial notice of a matter when the matter is "notorious" or when a party requests that the court take judicial notice and supplies the court with the required sources of indisputable accuracy.

R. v. Quinn (1975), 27 C.C.C. (2d) 543 (Alta. S.C.T.D.)

However, in Ontario it seems that a court has a broad discretion as to what matters it will judicially notice. A court is not required to take judicial notice of a matter, even where it may properly do so.

R. v. Zundel (No. 1) (1987), 31 C.C.C. (3d) 97, 56 C.R. (3d) 1 (Ont. C.A.),  
leave to appeal to S.C.C. refused 80 N.R. 317n

### Effect of Judicial Notice

Once a court has decided that it will take judicial notice of a matter, that declaration amounts to a finding that the fact has been proved. The other party may not subsequently lead evidence to dispute the fact.

R. v. Zundel (No. 1) (1987), 31 C.C.C. (3d) 97, 56 C.R. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused 80 N.R. 317n

D'Astous v. Baie-Comeau (1992), 74 C.C.C. (3d) 73 (Que. C.A.)

### Examples Where Judicial Notice of Fact Taken

It was appropriate for a court to take judicial notice that a particular road in Ottawa fell under the jurisdiction of the National Capital Commission, since this was a matter of common knowledge in the Ottawa area.

R. v. Potts (1982), 66 C.C.C. (2d) 219 (Ont. C.A.), leave to appeal to S.C.C. refused *ibid*

The use of the "24 hour clock system" is a matter of common knowledge. A court may properly take judicial notice that, for example, "1530" means 3:30 p.m.

R. v. Aitkenhead (1980), 8 Man. R. (2d) 393 (Man. Co.Ct.)

R. v. Cavallaro (1989), 96 A.R. 315 (Alta. Prov.Ct.)

A court may take judicial notice that an object described as a "Dodge Sedan" or a "car" is a motor vehicle. This is a matter of general knowledge.

R. v. Smith (1957), 119 C.C.C. 227 (N.S.S.C.A.D.)

Similarly, a court may take judicial notice of the meaning of common acronyms and abbreviations such as "DOB" for "date of birth".

R. v. Huddleston (1984), 28 M.V.R. 37 (Sask. Q.B.)

It is a matter of common knowledge that vehicles depreciate in value, and that they depreciate at a high rate in their first year.

Youssef v. Gilker (1980), 33 N.B.R. (2d) 383 (Q.B.)

### Examples Where Judicial Notice of Fact Not Taken

Judicial notice was not taken of the effect that a particular blood alcohol level would have had on a defendant where no expert evidence was given as to the effect of the presence of such a concentration of alcohol.

Ostrowski v. R. (1958), 122 C.C.C. 196 (Ont. H.C.)



Judicial notice of the exact location of a city limit was not taken where no speed limit change sign or other sign marked the boundary, the vehicle was close to the boundary, and the exact location of the boundary was not a matter of common knowledge.

R. v. Eagles, (1976), 31 C.C.C. (2d) 417 (Ont. H.C.J.)

## **Radar Devices**

The fact that the purpose of radar is the measurement of the speed of motor vehicles is an appropriate matter for judicial notice, since it is a matter of general knowledge.

Giffen v. R. (1980), 8 M.V.R. 313 (N.S.Co.Ct.)

D'Astous v. Baie-Comeau (1992), 74 C.C.C. (3d) 73 (Que. C.A.)

The general principle by which radar works (the emission of a beam of electromagnetic waves that is reflected by objects back to the emitting device) is also an appropriate matter for judicial notice, either because it is a matter of general knowledge or because it can be readily determined by reference to sources of indisputable accuracy.

D'Astous v. Baie-Comeau (1992), 74 C.C.C. (3d) 73 (Que. C.A.)

However, the issue of whether a particular radar speed measuring device is working accurately on a particular day, or the significance of the results of tests conducted to determine whether the device was working accurately on a particular day, are not proper matters for judicial notice. Such matters must be established by evidence.

R. v. Waschuk (1970), 1 C.C.C. (2d) 463 (Sask. Q.B.)

D'Astous v. Baie-Comeau (1992), 74 C.C.C. (3d) 73 (Que. C.A.)

For further discussion of judicial notice as it applies to speeding and its detection, see the annotations to s. 128 of the **Highway Traffic Act**.

## **Geography and Territorial Jurisdiction**

A court may take judicial notice that a particular town is within a particular county or province where the location of the town is a matter of common knowledge in the community where the trial is being held.

R. ex rel. White v. Fudell (1956), 116 C.C.C. 67 (Ont. H.C.)

R. v. Kline (1988), 86 N.S.R. (2d) 53 (N.S.S.C.T.D.)

The same principle holds true for geographic features.

R. v. Bednarz (1961), 130 C.C.C. 398 (Ont. C.A.)

It is a matter of common knowledge that the "City of Toronto" is in Canada, and a court may take judicial notice of this.

R. v. Cerniuk (1947), 91 C.C.C. 56 (B.C.C.A.)

It is appropriate to take judicial notice that a particular area is a "built-up area" where this is a matter of common knowledge in the community where the offence is being tried.

R. v. Redlick (1978), 41 C.C.C. (2d) 358 (Ont. H.C.)

### Judicial Notice of Law

The law in effect in a particular jurisdiction is a matter of law for the court, not a matter of evidence.

Royal Bank v. Neher, [1985] 5 W.W.R. 667 (Alta. Q.B.)

In effect, what the court does is take judicial notice of the law.

Numerous statutory provisions also provide for the taking of judicial notice of statutes and other related matters.

Evidence Act, R.S.O. 1990, c. E.23, ss. 25-28

Interpretation Act, R.S.O. 1990, c. I.11, s. 7

### Regulations

A court is not only entitled, but also required, to take judicial notice of regulations where those regulations have been published in *The Ontario Gazette* or in a consolidation or codification of regulations (such as the *Revised Regulations of Ontario*).

Regulations Act, R.S.O. 1990, c. R.21, ss. 5(1), 10

R. v. Bland (1974), 20 C.C.C. (2d) 334 (Ont. C.A.)

Similarly, a court must take judicial notice of federal regulations that have been published in *The Canada Gazette*.

Statutory Instruments Act, R.S.C. 1985, c. S-22, s. 16

R. v. Steam Tanker "Evgenia Chandris" (1976), 27 C.C.C. (2d) 241 (S.C.C.)

R. v. McDougall and Brodeau (1980), 33 N.B.R. (2d) 393 (N.B. Prov. Ct.)

Moreover, a court may take judicial notice of the fact of publication. Counsel is not required to prove publication.

R. v. Steam Tanker "Evgenia Chandris" (1976), 27 C.C.C. (2d) 241 (S.C.C.)

As a matter of practice, where counsel intends to refer the court to a regulation, counsel should have copies of the regulation available.

## Bylaws

It was formerly held that, as a general principle, courts could not take judicial notice of bylaws. Evidence of the bylaw had to be led.

R. v. Snelling, [1952] O.W.N. 214 (Ont. H.C.)

However, the existence of a bylaw could be proved circumstantially by the existence of signs designating the feature created by the bylaw (such as a speed limit or pedestrian crossover).

R. v. Clark (1974), 18 C.C.C. (2d) 52 (Ont. C.A.)

R. v. McLaren (1981), 10 M.V.R. 42 (Ont. C.A.)

More recent decisions have held that the earlier cases on this point fail to consider the effect of s. 7 and 29 of the **Evidence Act**. Section 7 provides that judicial notice shall be taken of an "Act", while s. 29 provides that "Act" includes an "enactment". Since a bylaw are "enactments", they are a proper subject of judicial notice.

R. v Smith (unreported, Ont. Prov. Ct., Oct. 11, 1988, per Harris P.C.J.)

Peterborough (City) v Lockyer (1992), 12 O.R. (3d) 214 (Ont. Prov. Div.)

Two points should be noted about this view. The first is that s. 7 is not permissive but mandatory: courts are not only entitled, but required, to take judicial notice of matters within its scope. The second is that these decisions are contrary to a great weight of authority in higher courts (although the particular ground upon which they are decided is not discussed in the earlier cases). In view of this, it would still be prudent to tender copies of bylaws into evidence, at least until the matter is addressed at a higher level.

## Foreign Law

The state of the law in a foreign jurisdiction (whether statutory or common law) is a question of fact. As such, it must be proved by evidence. Generally, this is done through calling expert witnesses.

Royal Bank v. Neher, [1985] 5 W.W.R. 667 (Alta. Q.B.)

Re Low, [1933] 2 D.L.R. 608 (Ont. C.A.)

This principle does not apply where a court considers decisions of courts in other jurisdictions to determine the state of the law in the court's own jurisdiction. The law in the court's own jurisdiction is a question of law, not one of fact.

Royal Bank v. Neher, [1985] 5 W.W.R. 667 (Alta. Q.B.)

### **Judicial Notice of Law Not Yet in Force**

A court may not take judicial notice of a bill, or an amendment to an existing statute, that has not yet been proclaimed into force, even if the bill or amendment would have retro- spective effect once proclaimed.

Bayshore Trust Co. v. Richardson (1991), 2 O.R. (3d) 522 (Gen. Div.)

## OPINION EVIDENCE

### Introduction

Generally, the laws of evidence only permit a witness to testify to matters of fact that the witness has observed. In certain limited circumstances, however, a witness is permitted to give an opinion on some matter. The opinion may be based on facts observed by the witness, facts related by other witnesses, or hypothetical assumptions that the witness is asked to make.

This aspect of the law of evidence is sometimes referred to as "expert evidence". This title is misleading, since not all opinion evidence is given by experts and not all evidence given by experts is opinion evidence.

Opinion evidence may be given by either lay or expert witnesses, provided the proper groundwork is laid. The principles and tests that govern the admissibility of the opinion will depend upon the category into which the witness falls.

### Opinions of Lay Witnesses

A lay witness may give evidence on a matter of common experience where that opinion is a summation or synthesis of facts observed by the witness whose total effect cannot easily be expressed by detailing the individual facts. If the witness can express what was observed more accurately by giving an opinion than by trying to detail all the "complicated and evanescent facts" that went into forming the opinion, the opinion is admissible. This has been referred to as the "compendious statement of facts" principle.

R. v. German (1947), 89 C.C.C. 90 (Ont. C.A.)

Graat v. R. (1982), 2 C.C.C. (3d) 365 (S.C.C.)

This principle reflects the truism that the line between what is fact and what is opinion is not always clear, and attempts to draw artificial distinctions will not always be possible or helpful.

Graat v. R. (1982), 2 C.C.C. (3d) 365 (S.C.C.)

A non-expert witness may not give opinion evidence on a question of mixed fact and law (such as whether a motor vehicle is being driven "without reasonable consideration for the lives and safety of others"). It is the job of the court, not the witness, to apply the opinion of the witness to the legal standard.

Graat v. R. (1982), 2 C.C.C. (3d) 365 (S.C.C.)



The weight to be given to the opinion evidence is a question for the trier of fact in all the circumstances of the case.

Graat v. R. (1982), 2 C.C.C. (3d) 365 (S.C.C.)

While the admissibility of lay opinion evidence is based on the "compensious statement of facts" principle, the rule does not make evidence of the underlying facts inadmissible. The party who is eliciting the opinion should also canvass the observations that led to the formation of that opinion by the witness. The more detailed the factual foundation, the more weight the opinion will carry. There are at least two reasons for this: first, the more detail is given, the more the court will be impressed with the powers of observation and recall of the witness; second, the more detail is given, the more the court can draw its own inference from the facts and compare that view to the opinion given by the witness.

### **Examples Where Lay Opinion Permitted**

The following are examples of matters upon which lay opinion evidence has been permitted. The list is illustrative only: it is the general principle discussed above that will govern whether the opinion is admissible in a particular case.

1. Identity of persons, handwriting and objects.

R. v. German (1947), 89 C.C.C. 90 (Ont. C.A.)

Graat v. R. (1982), 2 C.C.C. (3d) 365 (S.C.C.)

2. The physical and emotional state of other persons.

R. v. German (1947), 89 C.C.C. 90 (Ont. C.A.)

Graat v. R. (1982), 2 C.C.C. (3d) 365 (S.C.C.)

3. The condition and value of objects.

Graat v. R. (1982), 2 C.C.C. (3d) 365 (S.C.C.)

R. v. Steel Bros. Canada Ltd. (1986), 34 L.C.R. 210 (Fed. T.D.)

4. Similarity (but not identity) of shoe prints.

R. v. Hill (1986), 32 C.C.C. (3d) 314 (Ont. C.A.)

5. The level of sobriety or impairment of a person.

R. v. German (1947), 89 C.C.C. 90 (Ont. C.A.)

Graat v. R. (1982), 2 C.C.C. (3d) 365 (S.C.C.)

6. The speed of a motor vehicle.

R. v. German (1947), 89 C.C.C. 90 (Ont. C.A.)

Graat v. R. (1982), 2 C.C.C. (3d) 365 (S.C.C.)

7. The age of a person.

R. v. German (1947), 89 C.C.C. 90 (Ont. C.A.)

Graat v. R. (1982), 2 C.C.C. (3d) 365 (S.C.C.)

8. Identity of voices on tape recordings.

R. v. Rowbotham (1988), 41 C.C.C. (3d) 6 (Ont. C.A.)

### Admissibility of Expert Opinion

When considering the admissibility of expert opinion, it is important to keep in mind the often overlooked distinction between the admissibility of expert evidence on a particular topic and the admissibility of the evidence of a particular expert. Although the two matters are often collapsed into a single inquiry, they are conceptually distinct. A court considering whether a particular expert's opinion should be received must first determine whether expert opinion on the matter is admissible. If it is, the court must then consider whether the particular expert is qualified to give an opinion on the matter.

The basic principle governing the admissibility of expert opinion is that such evidence will be admitted where it will be helpful to the trier of fact on matters requiring special skill or knowledge. It is not admissible where the matter is part of the common stock of knowledge of ordinary people.

Fisher v. R. (1961), 130 C.C.C. 1 (Ont. C.A.), *aff'd ibid* at 22 (S.C.C.)

The function of an expert opinion is to provide the trier of fact with the knowledge necessary to properly assess matters that are likely to fall outside the knowledge and experience already possessed by the trier of fact.

Kelliher v. Smith, [1931] 4 D.L.R. 102 (S.C.C.)

R. v. Abbey (1982), 68 C.C.C. (2d) 394 (S.C.C.)

R. v. Beland (1987), 36 C.C.C. (3d) 481 (S.C.C.)

R. v. Lavallee (1990), 55 C.C.C. (3d) 97 (S.C.C.)

Expert opinion is admissible where the matter lies outside the common stock of knowledge of ordinary people, or where the common stock of knowledge of ordinary people is insufficient to allow the trier of fact to correctly evaluate the matter. Expert evidence is admissible to challenge a commonly held, but incorrect, view of some matter.

R. v. Lavallee (1990), 55 C.C.C. (3d) 97 (S.C.C.)

One issue that arises from this test is the degree of certainty that the foundations for the expert opinion must have where the opinion involves some new scientific discovery or theory. In many jurisdictions in the United States, the "*Frye* test" is applied. Expert opinion evidence will not be admitted unless it is based on a scientific principle or discovery that has gained general acceptance in the particular field in which it belongs.

Frye v. U.S., 293 F. 1013 (U.S.C.A., 1923)

This approach has not been adopted in Canada. In Canada, it seems that there is no such threshold that the evidence is required to meet, other than it must be relevant, must meet the test for expert opinion set out above, must be adequately reliable, and must not be excluded by any other rule of evidence. The weight to be given to the evidence is a matter for the trier of fact.

R. v. Medvedew (1978), 43 C.C.C. (2d) 434 (Man. C.A.)

R. v. Doe (1986), 31 C.C.C. (3d) 353 (Ont. Dist. Ct.)

R. v. Johnston (1992), 69 C.C.C. (3d) 395 (Ont. Gen. Div.)

However, expert opinion evidence may be excluded on the basis that its probative value is exceeded by its prejudicial effect where there is insufficient scientific verification of the theory being put forth.

R. v. Dieffenbaugh (1993), 80 C.C.C. (3d) 97 (B.C.C.A.)

Expert opinion is not limited to scientific or technical matters. Any area of specialized activity or knowledge that falls outside the common knowledge of ordinary people is an appropriate area for expert opinion.

R. v. Joyal (1990), 55 C.C.C. (3d) 233 (Que. C.A.)

### **Examples where Expert Opinion Allowed**

The following are examples of areas on which expert opinion has been permitted. It should be noted that the test set out above will result in a shifting standard over time, as information moves from the world of innovation to the stock of common knowledge of ordinary people.

1. The "battered wife syndrome" in the context of self-defence.

R. v. Lavallee (1990), 55 C.C.C. (3d) 97 (S.C.C.)

2. The typical physical and psychological conditions that arise as a result of sexual abuse of a child, where one issue was whether an assault had taken place.

R. v. B.(G.), (1990), 56 C.C.C. (3d) 200 (S.C.C.)

R. v. J.(F.E.), (1990), 53 C.C.C. (3d) 64, 74 C.R. (3d) 269 (Ont. C.A.)

3. The effect of stress on a police officer's marksmanship, where the issue was whether a person had been shot accidentally or intentionally.

R. v. Melaragni (1992), 76 C.C.C. (3d) 78 (Ont. Gen. Div.)

4. The fact that a person could have both heterosexual and homosexual relationships, where the defence had led evidence that a man charged with a homosexual sexual assault had normal heterosexual relationships.

R. v. Aylward (1992), 71 C.C.C. (3d) 71 (Nfld. C.A.)

5. Evidence of a person's psychiatric abnormality, where that abnormality would tend to show that the person would be unlikely to have committed the offence with which he is charged.

R. v. McMillan (1975), 23 C.C.C. (2d) 160 (Ont. C.A.)

6. Child abuse, and whether injuries to a child were caused accidentally or intentionally.

R. v. Millar (1989), 49 C.C.C. (3d) 193 (Ont. C.A.)

### **Examples where Expert Opinion Not Allowed**

The following are examples of cases where evidence was not admitted as expert opinion. Again, it should be noted that these are examples only, and it is the general principles that will determine particular cases as they arise.

1. Evidence that a phenomenon known as "anal gaping" was a indication of anal penetration, where there were other possible causes and no scientific studies considering how often the response would be found in people who had not been anally penetrated.

R. v. Dieffenbaugh (1993), 80 C.C.C. (3d) 97 (B.C.C.A.)



2. Evidence that the accused did not have an abnormal disposition for violence, where there was nothing in the circumstances of the offence to show that it was committed by a person with an abnormal disposition for violence.  
R. v. Robertson (1975), 21 C.C.C. (2d) 385 (Ont. C.A.)
3. Psychiatric evidence on how a normal person would react to an assault where there was no allegation that any abnormal mental condition resulted, since this was a matter that ordinary people could assess without expert assistance.  
R. v. Dubois (1976), 30 C.C.C. (2d) 412 (Ont. C.A.)

### Expert Evidence on Matters of Law

An expert may not give an opinion on questions of domestic law (i.e. the law of the jurisdiction where the trial is being held). The law is a matter for the trial judge and is not the proper subject of evidence. This principle applies to direct opinions on matters of law (for example, what is the correct legal test for careless driving) as well as questions of mixed facts and law (for example, did the defendant's conduct amount in law to careless driving).

Fisher v. R. (1961), 130 C.C.C. 1 (Ont. C.A.), *aff'd ibid* at 22 (S.C.C.)

R. v. Rabey (1977), 37 C.C.C. (2d) 461 (Ont. C.A.), *aff'd* (1980), 54 C.C.C. (2d) 1 (S.C.C.)

R. v. Oakley (1986), 24 C.C.C. (3d) 351 (Ont. C.A.)

R. v. Century 21 Ramos Realty Inc. and Ramos (1987), 32 C.C.C. (3d) 353 (Ont. C.A.)

For example, it was improper for a psychiatrist to give an opinion as to whether a particular mental condition amounted to a "disease of the mind" or to "non-insane automatism", since both of these are questions of law.

R. v. Rabey (1977), 37 C.C.C. (2d) 461 (Ont. C.A.), *aff'd* (1980), 54 C.C.C. (2d) 1 (S.C.C.) -

R. v. Oakley (1986), 24 C.C.C. (3d) 351 (Ont. C.A.)

Similarly, it was improper for an employee of Revenue Canada to give an opinion as to when an "appropriation" within the meaning of the Income Tax Act, occurred on a given set of facts. This was a matter of law for the judge to determine.

R. v. Century 21 Ramos Realty Inc. and Ramos (1987), 32 C.C.C. (3d) 353 (Ont. C.A.)

However, foreign law is a matter of fact and must be proved by expert evidence. This issue is discussed further in "Judicial Notice", *supra*.



### Expert Opinion on Credibility

As a general principle, assessing the credibility of witnesses is a matter for the trier of fact. Expert evidence on the issue of credibility is not admissible.

R. v. Beland and Phillips (1987), 36 C.C.C. (3d) 481 (S.C.C.)

R. v. B.(G.) (1990), 56 C.C.C. (3d) 200 (S.C.C.)

R. v. R.(S.) (1992), 73 C.C.C. (3d) 225, 15 C.R. (4th) 102 (Ont. C.A.)

This is one of the reasons, although not the only reason, why polygraph ("lie detector") tests are inadmissible in Canadian courts. Such evidence is not relevant to any issue in the case other than the credibility of the person tested.

R. v. Beland and Phillips (1987), 36 C.C.C. (3d) 481 (S.C.C.)

However, the fact that expert opinion may collaterally have the effect of bolstering the credibility of a witness, does not make the evidence inadmissible, provided that the evidence is otherwise admissible. This situation can occur where the expert gives an opinion that physical or psychological symptoms that the expert observed are consistent with the allegations of the complainant.

Khan v. College of Physicians & Surgeons (1992), 76 C.C.C. (3d) 10 (Ont. C.A.)

R. v. Ryan (1993), 80 C.C.C. (3d) 514 (B.C.C.A.)

For example, expert opinion on the dynamics of the psychiatrist-patient relationship is admissible to explain why a complainant in a charge of sexual assault against her psychiatrist might not resist and might continue as a patient, even where the expert's opinion had the collateral effect of bolstering her credibility when she claimed that this was what happened.

R. v. Ryan (1993), 80 C.C.C. (3d) 514 (B.C.C.A.)

Similarly, an expert opinion that certain observed conduct and symptoms are consistent with, or diagnostic of, child sexual abuse is admissible even though it will have the collateral effect of bolstering the credibility of the child claiming to have been abused.

R. v. J.(F.E.) (1989), 53 C.C.C. (3d) 64 (Ont. C.A.)

Khan v. College of Physicians & Surgeons (1992), 76 C.C.C. (3d) 10 (Ont. C.A.)

### Who May Give Expert Opinion Evidence

The test for whether the opinion of a particular expert is admissible is that of skill in the field in which the opinion is to be given. As long as the witness is skilled in the field, the way in which that skill was acquired is immaterial.

R. v. Silverlock, [1894] 2 Q.B. 766 (C.A.)

Rice v. Sockett (1912), 8 D.L.R. 84, 27 O.L.R. 410 (Ont. C.A.)

R. v. Bunniss, [1965] 3 C.C.C. 236, 44 C.R. 262 (B.C. Co.Ct.)

R. v. Kinnie (1989), 52 C.C.C. (3d) 112 (B.C.C.A.)

A person may be qualified as an expert on the basis of either study or practical experience (or on a combination of the two, which will probably be the most usual case). A person may be qualified as an expert on the basis of their academic or research credentials and qualifications even if they have little or no practical experience in the field in which they will give evidence.

R. v. Morgentaler (No. 2) (1973), 14 C.C.C. (2d) 450 (Que. Q.B.)

Conversely, a person who has considerable practical experience, and who has done considerable self-directed reading and study in a particular field, may be qualified as an expert notwithstanding their lack of formal academic or professional credentials. The lack of these goes only to the weight of the opinion, not its admissibility.

R. v. Bunniss, [1965] 3 C.C.C. 236, 44 C.R. 262 (B.C. Co.Ct.)

R. v. Rodych (1978), 41 C.C.C. (2d) 416 (B.C. Prov. Ct.)

The issue of whether a witness is qualified to give expert opinion is a question of law for the court to determine.

R. v. Faulds (1987), 36 C.C.C. (3d) 566 (Ont. C.A.)

R. v. Stevenson (1990), 58 C.C.C. (3d) 464 (Ont. C.A.)

### Examples of Persons Qualified as Experts

1. Ranchers who testified on the basis of "the expertise of long experience" about the behaviour of cows and calves where the issue was whether particular cows were the mothers of particular calves.

R. v. Galpin (1977), 34 C.C.C. (2d) 545 (B.C. Prov. Ct.)

2. Police officers who were familiar with the narcotic trade who described such matters as the nature and extent of the market for a particular narcotic, the prices obtainable in that market, the procedures used to reduce a massive shipment of the narcotic into marketable quantities and distribute it, and the typical procedures for sale.

R. v. Bengert (No. 2), (1979), 47 C.C.C. (2d) 552 (B.C.S.C.)

R. v. Joyal (1990), 55 C.C.C. (3d) 233 (Que. C.A.)

R. v. Fougere (1988), 40 C.C.C. (3d) 355 (N.B.C.A.)

### **Examples of Persons Not Qualified as Experts**

1. A social worker with "superficial" formal training and limited practical experience called to give evidence on the best interests of the child in a Crown wardship application.

C.C.A.S. of Hamilton-Wentworth v. S.(J.C.) (1986), 9 C.P.C. (2d) 265 (Ont. U.F.C.)

2. A biologist called to give evidence on the combined effects of alcohol and a particular drug who had taken one postgraduate course in pharmacology and read some literature but who had no training or experience in the combination of alcohol and the particular drug.

R. v. Kinnie (1989), 52 C.C.C. (3d) 112 (B.C.C.A.)

### **Persons Operating Scientific Instruments**

A person who is qualified in the use of scientific equipment may give in evidence the results obtained from the use of the equipment, provided that the person can establish that the machine is capable of making the required measurements or providing the required data, the machine was in good working order, and was properly used. The person does not have to be able to explain the inner workings of the machine, or how it arrives at the result that it does.

R. v. Grainger (1958), 120 C.C.C. 321, 28 C.R. 84 (Ont. C.A.)

R. v. Redmond (1990), 54 C.C.C. (3d) 273 (Ont. C.A.)

### **Adducing Expert Opinion**

In theory, adducing expert opinion involves two separate issues: establishing that the testimony that the expert will give falls into a proper area for expert opinion, and establishing that the particular expert is qualified to give the opinion. In practice, courts often fail to distinguish between the two issues, particularly where the court rather than a jury is the trier of fact.

The normal procedure is to hold a voir dire to determine these issues, unless counsel can agree to the admissibility of the evidence and the qualifications of the expert.

1. Indicate to the court the area upon which counsel proposes to have an expert give opinion evidence.
2. Place the qualifications of the witness before the court. The best way to do this is to file a copy of the expert's curriculum vitae as an exhibit and then call the expert to review his or her academic background, professional certifications, experience, professional memberships, publications and presentations, and anything else that supports the ability of the witness to give an opinion in the desired area. Leading questions should be used, since they ensure that nothing important is missed and avoid any appearance that the expert is boasting. Some counsel ask if the witness has been qualified as an expert to give evidence before. The danger with this procedure is that the expert may end up looking like a professional expert or "hired gun".

If the expert is particularly impressive, opposing counsel may attempt to draw the sting of this procedure by acknowledging the witness's qualifications. The best way to deal with this is something like the following: "Well, I appreciate my friend's concession, but I would like to canvass Dr. Smith's qualifications very briefly, so that the court can properly assess the weight to be given to her evidence". Then proceed to review at least the highlights of the witness's qualifications.

3. Allow opposing counsel to cross-examine the witness on his or her qualifications, if counsel wishes. Opposing counsel has the right to cross-examine on the qualifications of the witness before the witness is qualified, and need not wait until examination-in-chief has been completed.

Baker v. Hutchinson (1976), 13 O.R. (2d) 591 (C.A.)

The right to cross-examine on the qualifications of the expert should not be unduly fettered. So long as cross-examination is proceeding in a reasonable way, it should be permitted, even if it is lengthy. It is only where there is an oblique motive by opposing counsel (such as carrying on the cross-examination to the point where the other party does not have the financial resources to retain the expert any longer) that it should be terminated by the court.

R. v. Freed (1992), 37 M.V.R. (2d) 92 (Sask. C.A.)

4. Make submissions, if required, as to the appropriateness of expert evidence on the topic and the suitability of the proffered witness for qualification as an expert.



5. Ensure that the court gives a specific ruling as to whether the witness is qualified as an expert, and, if so, the areas in which the witness has been qualified to give expert opinion.

### **Qualifying Opponent's Witness as Expert**

A party examining an opponent's witness may qualify that witness as an expert and elicit opinion evidence from that witness during cross-examination in the same way that the party may qualify and elicit opinion evidence from its own witness. This may be done even if the party calling the witness did not call the witness as an expert or qualify the witness as one.

*Haida Inn Partnership v. Touche Ross* (1989), 34 B.C.L.R. (2d) 80 (B.C.S.C.)

It goes without saying that this is a very risky way of eliciting the desired evidence, not least because of the opposing party's right to re-examine.

### **Maximum Number of Experts**

The Ontario **Evidence Act** provides that no party may call more than three witnesses to give opinion evidence in a proceeding without leave of the court.

Evidence Act, R.S.O. 1990, c. E.23, s. 12

This restriction applies to the number of persons giving expert opinion, not the number of issues upon which expert opinion is given.

This restriction applies to the total number of witnesses giving opinion evidence throughout the case, not the number giving opinion evidence on a particular issue.

*Buttrum v. Udell*, [1925] 3 D.L.R. 45, 57 O.L.R. 97 (Ont. C.A.)

Permission to exceed the limit may be given at any time, even after three or more witnesses have already given opinion evidence.

*Reid v. Watkins*, [1964] 2 O.R. 249 (Ont. H.C.)

However, as a matter of practice it is clearly preferable to obtain this leave before any witnesses have given opinion evidence.

Failure to obtain leave will not be fatal on appeal provided that no substantial wrong or miscarriage of justice has occurred.

*Leadbetter v. West Shoe Co.*, [1944] O.W.N. 238 (C.A.)

*R. v. Vincent* (1963), 40 C.R. 365 (Man. C.A.)



### **Factual Basis of Expert Opinion**

An expert's evidence generally consists of two parts: a review of the facts upon which the opinion is based, and the opinion that the expert has formed based on those facts. The facts may consist of hypothetical matters that the expert is asked to assume (and that are established by other evidence in the trial), or they may consist of observations made, or information gathered, by the expert. Where the expert has received information from other persons out of court, this information is hearsay if relied upon for the truth of its contents at trial. The following principles govern the evaluation of the expert's opinion in such a case:

1. An expert opinion is admissible if relevant, even if it is based on hearsay.
2. The hearsay evidence is admissible to show the information upon which the expert opinion is based. It is not admissible as proof of the facts upon which the opinion is based.
3. Before any weight can be given to an expert's opinion, evidence admissible for the truth of the facts upon which the opinion is based must be before the court.

R. v. Abbey (1982), 68 C.C.C. (2d) 394 (S.C.C.)

R. v. Lavallee (1990), 55 C.C.C. (3d) 97 (S.C.C.)

R. v. Scardino (1991), 6 C.R. (4th) 146 (Ont. C.A.)

Where an opinion is based partly on facts supported by admissible evidence and partly upon hearsay for which there is no admissible evidence, the expert's opinion is admissible. The lack of a complete foundation goes to weight, not admissibility. The more the expert relies on facts not properly in evidence, the less weight the trier of fact should attribute to the opinion.

R. v. Lavallee (1990), 55 C.C.C. (3d) 97 (S.C.C.)

It should be noted that this is simply an application of the hearsay rule. As a result, there are two circumstances where an expert can give in evidence information obtained from others without infringing the hearsay rule. The first is where the information is not put in for its truth, but for the mere fact that it was said (for example, a psychiatrist can relate the fact that a defendant was claiming to be Napoleon, not to prove that he was, but to prove that he was suffering from a delusion). The second is where there is an exception to the hearsay rule that make the evidence admissible as proof of the truth of its contents.

## Use of Textbooks

An expert witness giving an opinion may base that opinion partly on the opinions of secondary sources (such as textbooks) that the witness considers authoritative. The witness may name these sources, and may consult them during the course of giving evidence.

R. v. Anderson (1914), 22 C.C.C. 455 (Alta. S.C.A.D.)

R. v. Somers (1963), 48 Cr. App. R. 11 (C.C.A.)

An expert witness giving opinion evidence may also be cross-examined on the writings of other experts in the field. If this is done, the following rules apply:

1. If the expert witness adopts the writing, the writing becomes part of the evidence of the witness and therefore part of the evidence in the case.

Ed Miller Sales Ltd. v. Caterpillar Tractor Co. (1991), 3 C.P.C. (3d) 231 (Alta. Q.B.)

2. If the witness acknowledges that the writer is an expert in the field but does not adopt the opinion of the writer, the opinion is not admissible for its correctness. It may be used, however, to test the evidence of the expert witness being cross-examined. As well, the party cross-examining the witness may be able to have its own expert witness later adopt the writing, at which point it becomes admissible for its truth.

R. v. Anderson (1914), 22 C.C.C. 455 (Alta. Q.B.)

Ed Miller Sales Ltd. v. Caterpillar Tractor Co. (1991), 3 C.P.C. (3d) 231 (Alta. Q.B.)

3. If the witness does not acknowledge the author of the writing to be an expert, the witness generally may not be cross-examined on the writing. However, if cross-examining counsel undertakes to call later a witness who will testify that the writing is authoritative and who will adopt the opinion as correct, the witness may be cross-examined on the opinion. This rule prevents both vexatious cross-examination on non-authoritative sources and false denials by the expert of contrary opinions deserving of consideration.

Ed Miller Sales Ltd. v. Caterpillar Tractor Co. (1991), 3 C.P.C. (3d) 231 (Alta. Q.B.)

Note that these principles apply to cross-examination of an expert witness on the writings of other experts. An expert witness may also be cross-examined on the expert's own prior writings, in which case the general principles governing prior statements will apply.

## Hypothetical Questions

An expert may express an opinion based on facts that the expert did not personally observe but is asked by counsel to assume. The weight to be given to the opinion depends on the extent to which there is a proper foundation in evidence for the facts that the expert is being asked to assume.

See also the discussion in "Factual Basis of Expert Opinion", *supra*.

As a general rule, it is inappropriate to ask an expert to give an opinion based on evidence that the expert has heard given at trial. The better procedure, and the procedure that must be followed if there is any conflict in the evidence or issue of credibility, is to outline to the expert the matters upon which the opinion is to be based. However, where there is no conflict in the evidence upon which the opinion is to be based, the expert may express an opinion based on the evidence rather than a hypothetical question.

Bleta v. R., [1964] S.C.R. 561, [1965] 1 C.C.C. 1 (S.C.C.)

R. v. Swietlinski (1978), 44 C.C.C. 267, 5 C.R. (3d) 324 (Ont. C.A.), *aff'd* on other grounds (1980), 55 C.C.C. (2d) 481 (S.C.C.)

Khan v. College of Physicians & Surgeons (1992), 76 C.C.C. (3d) 10 (Ont. C.A.)

On cross-examination, the expert may be asked to state his opinion based on the cross-examining counsel's version of the facts.

Beckwith v. Sydebotham (1807), 170 E.R. 987

A hypothetical question generally takes the form of a series of matters that the expert is asked to assume, followed by a request for an opinion based on those matters. If the hypothetical question to be put to the expert is at all complex, it is preferable to develop the question in writing before the trial. This serves two purposes: it ensures that the opinion given in response takes into account all the important matters, and it also serves as a checklist for counsel at trial to ensure that admissible evidence is led on all elements of the foundation of the opinion.

## Opinion As to Ultimate Issue

Some older cases have held that expert evidence was not admissible where the evidence consisted of an opinion on the very issue that the trier of fact was required to decide. This rule was known as the "ultimate issue rule". This view has now been authoritatively rejected. Opinion evidence, whether of experts or lay persons, is not rendered inadmissible merely because it goes to the very issue that the trier of fact has to decide. Such evidence does not "usurp the functions of the trier of fact", since the weight to be given to the evidence is entirely a matter for the trier of fact.



Graat v. R. (1982), 2 C.C.C. (3d) 365 (S.C.C.)

R. v. Millar (1989), 49 C.C.C. (3d) 193 (Ont. C.A.)

Khan v. College of Physicians & Surgeons (1992), 76 C.C.C. (3d) 10 (Ont. C.A.)

The court retains a discretion over the form in which an opinion is given. In an appropriate case, it may require an opinion to be given in more descriptive and conclusory terms than an expression on the ultimate factual issue that must be decided. For example, rather than expressing an opinion that "this was a case of child abuse", a physician might be required to express an opinion in terms of the degree of likelihood that all the injuries on a child could have been caused other than deliberately.

Khan v. College of Physicians & Surgeons (1992), 76 C.C.C. (3d) 10 (Ont. C.A.)

As a practical matter, it is poor advocacy to have the witness simply state a conclusion. The weight to be given to an opinion, whether expert or lay, will be affected by the factual foundation upon which it is based and the process by which the opinion is reached. These matters should be covered in detail during examination in chief.

### **Cross-Examination of Experts**

While cross-examining an expert is not easy and can be intimidating, it is rarely impossible. There are a number of standard techniques that may be used in such a cross-examination.

1. Cross-examination on qualifications. A cross-examination that establishes an expert to be unqualified is rare. However, it may be possible to show that the area upon which the expert is testifying is not the expert's principal area of expertise. As well, if the cross-examiner also has an expert, it may be possible to build up that expert during the cross-examination. The aim is to get the expert being cross-examined to admit that the cross-examiner's expert is as well or better qualified as the expert testifying, and that the views of the cross-examiner's expert are entitled to consideration even if the expert being cross-examined does not agree with them.
2. Cross-examination on the factual basis of the opinion. Very often an expert's opinion is based solely on facts that the expert has been asked to assume (and that will be the subject of other evidence), rather than on actual observations by the expert. Cross-examine to make this clear. The aim of such a cross-examination is to get the expert to admit that the opinion is based entirely on the assumptions the expert has been asked to make. Counsel can then challenge the credibility of the witnesses who provide the factual foundation. During the closing, counsel can then argue that even if the expert's opinion is accepted, it is entitled to no weight since there is no factual foundation. A good example is

an "evidence to the contrary" breathalyzer defence, where a toxicologist testifies that what the defendant says that he had to drink would not have given the breathalyzer reading that resulted. The standard cross-examination is to have the expert acknowledge that the opinion is based entirely on the defendant's evidence of consumption. Counsel can then cross-examine the defendant and challenge his credibility. The advantage of this method is that it avoids a direct attack on the expert opinion.

3. Cross-examination on alternative explanations of the facts. Counsel may be able to suggest to the expert alternative explanations of the facts upon which the expert is basing the opinion. For example, in an "evidence to the contrary" breathalyzer defence, an expert may offer an opinion that the observed symptoms of impairment are so minimal as to be inconsistent with the breathalyzer reading. Counsel could suggest in cross-examination that the symptoms are consistent with a practiced drinker who is experienced in "holding his liquor" in social situations. Again, this technique avoids a direct attack on the opinion.
4. Cross-examination on additional facts. The expert opinion will be based typically on a hypothetical question that asks the expert to take certain facts into account in coming to an opinion. The cross-examiner may put other facts to the witness that, if established, may affect the opinion. For example, in a careless driving case involving a failure to stop at an intersection, an expert may give evidence that the failure to stop was due to the condition of the road surface, rather than the defendant's failure to apply the brakes. Counsel in cross-examination may put to the witness other matters such as the ability of vehicles before and after to stop, the fact that the driver behind did not see the brake lights flash on the defendant's car, the fact that the road surface was checked and nothing was found, and so forth, and suggest that the expert's opinion is not consistent with these additional facts. If there are a number of such facts, it is best to proceed one point at a time: the expert may be able to explain away some of the facts, but eventually ends up having to concede the point or look partisan.
5. Cross-examination to strengthen the cross-examiner's case. It may be possible to obtain admissions from the expert that strengthen some aspect of the cross-examiner's case. A typical area where this can be done is where some scientific or technical procedure has been used and the expert is giving an opinion about the results. It is a fair working assumption that if the expert has not criticized the procedures used during examination-in-chief, the procedure is appropriate and has been appropriately performed. For example, a toxicologist in a breathalyzer case who has testified that the defendant's stated consumption would not have given the readings that the breathalyzer showed, but who has not criticized the instrument or the breathalyser technician, may be cross-examined to produce an acknowledgement that the breathalyzer is a generally reliable instrument, the set-up and testing was appropriately conducted, and there is nothing to suggest that the instrument was not operating properly. This form of cross-examination



should be conducted with care: questions should proceed by small increments to allow for "testing the water" and a hasty retreat if it seems that some unwanted answer may be forthcoming.

6. Cross-examination on authoritative writing or opinions (that of the expert or of another expert in the field). The technique for doing this is described in "Use of Textbooks", *supra*. Its limits should be appreciated. The most that can realistically be hoped for is that the expert will acknowledge that there are other legitimate opinions or views that contradict the opinion the expert has given. Where one cross-examines an expert on the expert's own prior writings expressing a different opinion, most experts will have an explanation for the shift. One can then get the expert to acknowledge that views may change over time, and it is possible that the expert may change his or her opinion further in the light of research or discoveries yet to come.
7. Cross-examination to impeach the witness, rather than the evidence. This is not often possible. Tactics such as pointing out that the witness is being paid to come to court are cheap, and are likely to backfire (counsel are usually being paid to come to court). However, an expert can sometimes be shown through cross-examination to be overly egotistical, overly dogmatic, overly biased, overly hostile to the other party (or the other party's expert: academic rivalry can be bitter), or too quick to offer opinions in areas outside the expert's field of expertise. This can legitimately affect the weight to be given to the expert's opinion, even if the opinion itself is not directly challenged. It is rarely possible to plan such a cross-examination unless counsel is familiar with the expert, but counsel should be alert for signs of such traits in cross-examination so that they can be followed up if they present themselves.

Successful cross-examinations of experts require thought and careful planning. It is perfectly proper to ask for a recess before beginning such a cross-examination, particularly if counsel was not given any notice that the expert would be called and what the evidence would be.

### Evaluation of Expert Opinion

The following passage from *Phipson's Law of Evidence* (9th ed.) has been cited with approval by some Canadian courts.

The testimony of experts is often considered to be of slight value, since they are proverbially, though perhaps unwittingly, biased in favour of the side which calls them, as well as over-ready to regard harmless facts as confirmations of preconceived theories; moreover, support or opposition to given hypotheses can generally be multiplied at will...

This approach to expert evidence has been firmly *disapproved* by the Supreme Court of Canada as representing an out-of-date and unfair approach to the evidence of expert witnesses (without denying that there may be particular individuals to whom the description may apply).

More v. R., [1963] 3 C.C.C. 289 (S.C.C.)

When considering an issue upon which expert opinion has been given, the trier of fact should consider all evidence, whether expert opinion or the evidence of lay witnesses, that is relevant to that issue. The trier of fact is not limited to considering the expert opinion alone.

R. v. Smithers (1975), 24 C.C.C. (2d) 344 (Ont. C.A.), aff'd (1977), 34 C.C.C. (2d) 427 (S.C.C.)

Before any weight can be given to an expert's opinion, evidence admissible for the truth of the facts upon which the opinion is based must be before the court. Where an opinion is based partly on facts supported by admissible evidence and partly upon hearsay for which there is no admissible evidence, the expert's opinion is admissible: the lack of a complete foundation goes to weight, not admissibility. The more the expert relies on facts not properly in evidence, the less weight the trier of fact should attribute to the opinion.

R. v. Lavallee (1990), 55 C.C.C. (3d) 97 (S.C.C.)

The trier of fact may accept all, part, or none of the evidence of an expert. The uncontradicted evidence of a duly qualified expert should not be lightly disregarded, although a court is entitled to reject such evidence provided it first considers and evaluates it. Similarly, where the evidence of experts is contradictory, it should be considered and weighed by the trier of fact.

R. v. Prairie Schooner News Ltd. (1970), 1 C.C.C. (2d) 251 (Man. C.A.)

R. v. Baribeau (1983), 20 M.V.R. 60 (Ont. Co.Ct.)

Where both parties call expert opinion evidence, it is not sufficient for the court to simply "count heads" and automatically follow the view expressed by the greater number of experts called. The court must consider and evaluate the evidence and come to its own conclusion.

Shawinigan Engineering Co. v. Naud, [1929] S.C.R. 341 (S.C.C.)

While a court should give the opinion of a duly qualified expert careful consideration, the court may reject the evidence based on the demeanour of the witness while testifying (for example, where the manner in which the evidence was given was evasive or slanted, or where the witness showed a particular bias). There need not be conflicting evidence on the substance of the testimony before it is rejected.

R. v. United Ceramics Ltd. (1979), 52 C.C.C. (2d) 19 (Ont. Prov. Ct.)

R. v. Keller (1990), 25 M.V.R. (2d) 7 (Ont. Gen. Div.)

## PHOTOGRAPHS, FILM AND VIDEOTAPE

### Introduction

The general principles governing the admissibility of photographs, film and videotape have been developed by the courts, rather than by statute.

Photographs can be powerful evidence. Since they can record visual matters in a manner that is not subject to the potential deficiencies of eyewitness perception, memory and recall, they are highly persuasive. They also provide an often refreshing contrast to oral testimony.

Perhaps because of this powerful impact, courts have developed particular criteria for the admissibility of photographs. These criteria operate at two levels:

- (i) technical, dealing with the the verification of the accuracy of the photograph; and
- (ii) discretionary, dealing with the effect of the photograph on the trier of fact.

### Purposes of Photographic Evidence

Like all evidence, photographs must be relevant in order to be admissible. Whether or not the photograph is relevant will depend upon the circumstances of the particular case. The following are only examples of purposes for which photographs may be admitted.

1. To show the material an expert used in arriving at his opinion.  
R. v. Gallant (1965), 47 C.R. 309 (P.E.I.S.C.)
2. To show minute details not otherwise visible to the naked eye.  
R. v. Gallant (1965), 47 C.R. 309 (P.E.I.S.C.)
3. To bring forth facts more clearly than can be done by oral description.  
R. v. Cartman, [1940] N.Z.L.R. 725 (N.Z.S.C.)
4. To explain, support and corroborate the oral evidence.  
R. v. Sim (1954), 108 C.C.C. 380 (Alta. S.C.)  
R. v. O'Donnell (1936), 65 C.C.C. 299 (Ont. C.A.)  
R. v. Green (1972), 9 C.C.C. (2d) 289 (N.S.C.A.)  
Draper v. Jacklyn (1969), 9 D.L.R. (3d) 264 (S.C.C.)

5. To assist in understanding issues and theories raised by the Crown or defence.  
R. v. Salmon (1972), 10 C.C.C. (2d) 184 (Ont. C.A.)
6. To illustrate the scene and victim of a murder to assist in determining which of the two accused was telling the truth.  
R. v. Kendall and McKay (1987), 35 C.C.C. (3d) 105 (Ont. C.A.)
7. To draw an inference of the defendant's intent from the physical facts.  
R. v. Davis (No. 2) (1977), 35 C.C.C. (2d) 464 (Alta. C.A.)
8. To show a link between items of evidence, such as injuries and an alleged weapon.  
R. v. Wildman (1981), 60 C.C.C. (2d) 289 (Ont. C.A.), rev'd on other grounds (1984) 14 C.C.C. (3d) 321 (S.C.C.)
9. To give an overview of the physical location where events took place.  
R. v. Laviolette and Lund (1982), 35 N.P.E.I.R. 524 (P.E.I.S.C.)

### Technical Criteria For Admissibility

In order for photographs to be admissible, the following technical prerequisites must be established:

- (i) the photographs accurately represent the facts;
- (ii) the photographs are not misleading; and,
- (iii) the photographs have been verified in evidence by a person capable of doing so.

R. v. Creemer and Cormier (1967), 1 C.R.N.S. 146 (N.S.C.A.)

R. v. Smith (1986), 71 N.S.R. (2d) 229 (N.S.C.A.)

It is not necessary to call the person who took a photograph in order to verify it, provided that the witness who verifies the photograph is able to confirm its accuracy.

R. v. Bannister (1936), 66 C.C.C. 38 (N.B.S.C.A.D.)

Photographs of a bruised person that came out darker than life have been held to be admissible where there was oral evidence explaining the reason for the darkness and describing the actual appearance of the injuries.



R. v. Taylor (1979), 48 C.C.C. (2d) 523 (Nfld. C.A.)

A film record of radar echoes recorded mechanically at a shore radar station was admissible, although no person was monitoring the radar at the time the photograph was taken.

The "Statue of Liberty", [1968] 2 All E.R. 195

The same principles that govern the verification of videotape when no person was present at the time when the videotape was taken (discussed *infra*) should apply to still photographs.

While a photograph taken by a Multanova camera (a device that measures the speed of a motor vehicle by radar, photographs the motor vehicle, and prints the speed of the vehicle on the photograph, all without the aid of a human operator) has been held inadmissible as proof of the speed of the vehicle, the court's objection was with the hearsay nature of the speed reading and not the photograph itself. The photograph would be admissible to show that the vehicle in question was on the road at the time.

R. v. Chow (1991), 29 M.V.R. (2d) 7 (Alta. Q.B.)

### Discretion of Trial Judge

Even where the technical criteria for admissibility have been met, the court has a discretion as to whether the photographs will be admitted into evidence. Photographs should be admitted as evidence where, and only where, their probative value exceeds their prejudicial effect.

Draper v. Jacklyn (1969), 9 D.L.R. (3d) 264 (S.C.C.)

R. v. Salmon (1972), 10 C.C.C. (2d) 184 (Ont. C.A.)

R. v. Wildman (1981), 60 C.C.C. (2d) 289 (Ont. C.A.)

R. v. Kendall and McKay (1987), 35 C.C.C. (3d) 105 (Ont. C.A.)

The probative value of photographs must be assessed in relation to the live issues at the trial. Concessions by the defence may lessen the probative value of evidence.

R. v. Dilabbio, [1965] 4 C.C.C. 295 (Ont. C.A.)

R. v. Laviolette and Lund (1982), 35 N.P.E.I.R. 524 (P.E.I.S.C.)



Two points can be made in arguing against the alleged prejudicial effect of photographs. First, prejudicial effect should be less of a concern in a trial conducted before a justice of the peace or provincial court judge than it would be before a jury. Second, the range of visual images that persons see on television or in films is much broader today than it was in the past. Sights that would have shocked or horrified a viewer some years ago may be almost commonplace now.

### Examples of Photographs Admitted

The following are examples where photographs have been admitted. In each case, the crucial consideration is not the subject matter of the photograph itself, but whether the probative value of the photograph exceeds any prejudicial effect.

1. Photographs of a deceased biker showing head injuries that he had suffered.  
R. v. Emkeit (1971), 3 C.C.C. (2d) 309, aff'd 6 C.C.C. (2d) 1 (S.C.C.)
2. Photographs of an accident victim's face showing scars and pins in his jaw which protruded from his face during facial reconstruction, used in an action for damages to illustrate the treatment he received and his appearance during treatment.  
Draper v. Jacklyn et al. (1969), 9 D.L.R. (3d) 264 (S.C.C.)
3. Colour and black and white photographs showing the bruises, bloodied body and lacerations of the murder victim, used to identify the victim and assist in the illustration of injuries.  
R. v. Green (1972), 9 C.C.C. (2d) 289 (N.S.C.A.)
4. Coloured photographs of a murder victim at the scene and at the autopsy showing the twenty stab wounds he received, and photographs of the scene itself. The former were relevant to show the injuries and permit an inference to be drawn as to the intent of the accused from the nature of the injuries; the latter helped describe the scene and also illustrated the physical difficulties the scene would have posed to a severely intoxicated person.  
R. v. Davis (No. 2) (1977), 35 C.C.C. (2d) 464 (Alta. C.A.)
5. Photographs of bruising and lacerations on an elderly rape victim, used to show the nature of the injuries.  
R. v. Taylor (1979), 48 C.C.C. (2d) 523 (Nfld. C.A.)

6. Photographs of the head of an eight year old girl murdered by hatchet blows to the head, used to link the nature of the injuries to the alleged murder weapon.  
  
R. v. Wildman (1981), 60 C.C.C. (2d) 289 (Ont. C.A.), rev'd on other grounds (1984), 14 C.C.C. (3d) 321 (S.C.C.)
7. Photographs of wounds on a murder victim and blood spatters at the scene of the murder, put before the jury to assist in determining which of the two accused's versions of the murder was consistent with the physical facts.  
  
R. v. Kendall and McKay (1987), 35 C.C.C. (3d) 105 (Ont. C.A.)

### Colour Photographs

The accurate portrayal of injuries and scenes suggests the advantages of colour photographs. Black and white films are less suitable since they are primarily blue-sensitive; that is why prints of blue skies are usually lighter than they actually appear. If a bruise is dark blue, it will become too light. If a bruise is red, it will appear too dark. Also, when black and white negatives are enlarged, bruises may be printed either too light or too dark.

[The colour photographs were] certainly more vivid than the black and white photographs...and...also more natural but to produce these four is in order to give a clear indication to the jury of the scene that's to be considered by them, and, in my opinion, there is nothing about the coloured photographs which would in any way mislead the Jury or be unduly inflammatory.

R. v. Green (1972), 9 C.C.C. (2d) 289 at 299 (N.S.C.A.)

### Film and Videotape

Generally, the same principles apply to the admission of videotape evidence as to photographs. The party seeking the admission of the videotape must prove through the verification evidence of witnesses under oath, that it accurately and fairly represents the event that took place.

R. v. Maloney (No. 2) (1976), 29 C.C.C. (2d) 431 (Ont. Co. Ct.)

R. v. Leaney (1987), 38 C.C.C. (3d) 263 (Alta. C.A.), varied on other grounds (1989), 50 C.C.C. (3d) 289 (S.C.C.)

Where there is no eyewitness to the events recorded by videotape, the accuracy and fairness of the recording must be verified by technical evidence that should preferably include a description of the equipment, its location, and its manner

of activation and operation.

R. v. Leaney (1987), 38 C.C.C. (3d) 263 (Alta. C.A.), varied on other grounds (1989), 50 C.C.C. (3d) 289 (S.C.C.)

R. v. Caughlin (1987), 40 C.C.C. (3d) 247 (B.C. Co. Ct.)

R. v. Schaffner (1988), 44 C.C.C. (3d) 507 (N.S.C.A.)

R. v. Taylor (1983), 10 W.C.B. 303 (Ont. Prov. Ct.)

U.S. v. Taylor, 530 F. 2d 639 (U.S.C.A. 1976)

A defence videotape of a re-enactment of a burlesque dance was admitted as evidence of the defendant's acts on the date in question only in so far as it was adopted by Crown witnesses who viewed the dance on that occasion.

R. v. Murphy (1972), 8 C.C.C. (2d) 313 (Ont. Prov. Ct.)

In two cases, a videotape of an alleged assault during a hockey game was held admissible only when shown at actual speed, and not in slow motion.

R. v. Maloney (No. 2) (1976), 29 C.C.C. (2d) 431 (Ont. Co.Ct.)

R. v. Williams (1977), 35 C.C.C. (2d) 103 (Ont. Co. Ct.)

It appears that in both cases the length of time during which the alleged assault occurred was far more important than the details of what took place. It is submitted that neither of these two cases is a bar to running a film or videotape in slow motion in a proper case to determine details happening too quickly to be seen by the naked eye (although it may well be necessary to call expert evidence on the issue of whether slowing down the film would cause any distortion of the events depicted).

An edited videotape has been held to be admissible where the editing was not for the purposes of trial and the person who took the original videotape could verify that the edited version was a fair and accurate depiction of what took place.

Oja v. Nahal (1989), 18 A.C.W.S. (3d) 251 (B.C.C.A.)

### **Photos Found in Possession of Defendant**

Photographs found in the possession of the defendant are admissible provided they are relevant and not excluded by some other exclusionary rule. It is unnecessary to prove verification by the photographer.

R. v. Lambert, [1967] Crim. L.R. 480 (Eng. Ct. of Crim. App.)

R. v. Davis, [1970] 3 C.C.C. 260 (Alta. C.A.)

Such photographs can presumably be used as original evidence, or as statements or adoptive admissions, in the same way as other items of documentary evidence.

See "Documentary Evidence", *supra*

E14-8

EVIDENCE



## REASONABLE DOUBT

### Introduction

Generally, proof beyond a reasonable doubt is the standard to which the Crown must prove all elements of an offence in order to have the defendant found guilty of that offence.

This section discusses only the meaning of "reasonable doubt". The concept of reasonable doubt says nothing about which party must prove a particular element, or what standard that party must meet. It is only after this has been established that the question of what is meant by "reasonable doubt" becomes important. The allocation of the burden of proof (or in other words, on which party the burden lies to establish something and to what degree it must be established before it can be said to be proven) is discussed in "Burden of Proof", above.

### Definition

The following definition of reasonable doubt has been approved in the context of a charge to the jury by the Ontario Court of Appeal for its accuracy and clarity:

The onus, or the burden, of proving the guilt or innocence of an accused person rests upon the Crown, and never shifts. There is no burden on the accused person to prove that he is innocent, and the burden on the Crown is to prove guilt beyond a reasonable doubt.

Until and unless the Crown proves that to your satisfaction, an accused person cannot be convicted. So that if, at the end of your deliberations, you have a reasonable doubt as to whether the accused committed the offence charged, it is your duty to give the accused the benefit of the doubt and find him not guilty.

It is rarely possible, of course, to prove anything with absolute certainty, so the burden of proof on the Crown is to prove guilt beyond a reasonable doubt.

I don't want to belabour that phrase, but I think I should, in fairness, warn you it will be coming up again and again throughout my charge to you. When I speak of "reasonable doubt", I use those words in their ordinary, natural meaning; not as words having some special, legal, mystical connotation. A reasonable doubt is an honest doubt, a fair doubt. It is a doubt based on reason and based on common sense. It is a real doubt; it is not an imaginary one or a frivolous one. I do not think that you should substitute any other phrase for that one; for reasonable doubt.

R. v. Hogan (1982), 2 C.C.C. (3d) 557 (Ont. C.A.)

A definition substantially in the words of the final paragraph has been described approvingly in numerous cases as the "traditional and accepted formulation".

R. v. Campbell (1977), 38 C.C.C. (2d) 6 (Ont. C.A.)

R. v. Tuckey et al. (1985), 20 C.C.C. (3d) 502 (Ont. C.A.)

The Ontario Court of Appeal has also cautioned that it is both undesirable and unnecessary to elaborate upon the meaning of reasonable doubt in a charge to the jury by departing from this traditional and accepted formulation.

R. v. Blunden (1976), 30 C.C.C. (2d) 122 (Ont. C.A.)

R. v. Campbell (1977), 38 C.C.C. (2d) 6 (Ont. C.A.)

R. v. Tuckey et al. (1985), 20 C.C.C. (3d) 502 (Ont. C.A.)

The same is true for a court sitting alone as trier of fact. It is probably undesirable for counsel to try to elaborate on the test in argument; counsel should simply refer to "reasonable doubt" itself. Of course, if opposing counsel incorrectly states the burden of proof it may be necessary to remind the court of the correct standard, perhaps by quoting the above.

### **Proof to a Moral Certainty**

Occasionally the term "proof to a moral certainty" is used by counsel or the court rather than "proof beyond a reasonable doubt". Properly understood, the two terms have the same meaning and it is an error for the court to suggest that they involve different standards.

R. v. Gordon (1983), 4 C.C.C. (3d) 492 (Ont. C.A.)

R. v. Sears (1947), 90 C.C.C. 159, 5 C.R. 1 (Ont. C.A.)

Some courts have disapproved of the term "moral certainty". This is permissible provided that the court does not suggest that the standard of "moral certainty" is any different to "proof beyond a reasonable doubt" and properly instructs itself on the latter standard.

R. v. Hogan (1982), 2 C.C.C. (3d) 557 (Ont. C.A.)

R. v. Gordon (1983), 4 C.C.C. (3d) 492 (Ont. C.A.)

### **Beyond Any Peradventure of Doubt or Beyond Any Shadow of a Doubt**

Tests such as "beyond any peradventure of a doubt" or "beyond any shadow of a doubt" are incorrect. They describe a much stricter standard than "beyond a reasonable doubt", which is all that the Crown is required to prove.

Stewart v. R (1976), 31 C.C.C. (2d) 497 (S.C.C.)

### **Existence of Possibilities**

Reasonable possibilities in favour of a defendant that arise from the evidence may give rise to a reasonable doubt. It is an error for a court to exclude reasonable possibilities from the concept of reasonable doubt by directing itself that a reasonable doubt must be based on probabilities and not possibilities.

R. v. Campbell (1977), 38 C.C.C. (2d) 6 (Ont. C.A.)

R. v. Finlay and Grellette (1985), 23 C.C.C. (3d) 48 (Ont. C.A.)

One English court has suggested the following exposition as a way of explaining the concept of reasonable doubt.

If the evidence is so strong against a man so as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible but it is not in the least probable" the case is proved beyond a reasonable doubt, but nothing short of this will suffice.

Miller v. Minister of Pensions, [1947] 2 All E.R. 372 (Q.B.)

This passage has been firmly and repeatedly *disapproved* in Ontario, since it improperly waters down the concept of proof beyond a reasonable doubt.

R. v. Lachance, [1963] 2 C.C.C. 14, 39 C.R. 127 (Ont. C.A.)

R. v. Campbell (1978), 38 C.C.C. (2d) 6, 1 C.R. (3d) 309 (Ont. C.A.)

R. v. Figueira (1981), 63 C.C.C. (2d) 409 (Ont. C.A.)

R. v. Finlay and Grellette (1985), 23 C.C.C. (3d) 48 (Ont. C.A.)

### **Prima Facie Case**

Proof beyond a reasonable doubt is not the same as establishing a prima facie case. The expression "prima facie case" can be used in one of two ways. A "permissive" prima facie case refers to a situation where there is some evidence on each of the elements of the offence. A "presumptive" prima facie case arises where the Crown evidence is, in the absence of evidence to the contrary, conclusive proof of

the offence. Both forms of prima facie case are measurements of the strength of the Crown's case only, not assessments of all the evidence. The test of "beyond a reasonable doubt" is applied at the end of the case to all the evidence led by both parties.

R. v. Skorput (1992), 72 C.C.C. (3d) 294 (Ont. Ct., Prov. Div.)

### Test Applies to Elements of Offence

The standard of proof beyond a reasonable doubt does not apply to individual items of evidence, or the separate pieces of evidence that make up the Crown's case, but to the total body of the evidence relevant to each element of the offence. It is the elements of the offence that must be proved beyond a reasonable doubt, not the individual items of evidence.

Stewart v. R. (1976), 31 C.C.C. (2d) 497 (S.C.C.)

R. v. Bouvier (1984), 11 C.C.C. (3d) 257 (Ont. C.A.), aff'd (1985), 22 C.C.C. (3d) 576 (S.C.C.)

R. v. Moreau (1986), 51 C.R. (3d) 209 (Ont. C.A.)

R. v. Morin (1988), 66 C.R. (3d) 1 (S.C.C.)

This rule applies whether the evidence relied upon is direct, circumstantial, or a combination of the two.

R. v. Bouvier (1984), 11 C.C.C. (3d) 257 (Ont. C.A.), aff'd (1985), 22 C.C.C. (3d) 576 (S.C.C.)

### Application to Credibility

The doctrine of reasonable doubt applies to the issue of credibility, and credibility must be assessed in determining whether the Crown has proved its case beyond a reasonable doubt. The court need not firmly believe or disbelieve any witness or set of witnesses in reaching its conclusion, but should apply the following principles:

1. If it believes the exculpatory evidence led by the defendant, it must acquit.
2. If it does not believe the exculpatory evidence led by the defendant but is left in a state of reasonable doubt by the evidence, it must acquit.
3. Even if the court is not left with a reasonable doubt from the evidence led by the defendant, it must be convinced by evidence that it does accept that the Crown has proved all of the elements of the offence beyond a reasonable doubt.

R. v. W.(D.) (1991), 63 C.C.C. (3d) 397 (S.C.C.)

R. v. Teresinski (1992), 70 C.C.C. (3d) 268 (Ont. C.A.)



### Evidence of Defence Witnesses

As the previous section implies, evidence of defence witnesses does not have to be "accepted" before it can raise a reasonable doubt. If the evidence of a defence witness is not accepted but does raise a reasonable doubt in the mind of the court on some element of the offence, the defendant is entitled to an acquittal.

R. v. Challice (1979), 45 C.C.C. (2d) 546 (Ont. C.A.)

Nadeau v. R. (1984), 15 C.C.C. (3d) 499, 42 C.R. (3d) 385 (S.C.C.)

R. v. Thatcher (1987), 32 C.C.C. (3d) 481, 57 C.R. (3d) 97 (S.C.C.)

R. v. Morin (1988), 66 C.R. (3d) 1 (S.C.C.)

R. v. Jack (1992), 70 C.C.C. (3d) 67 (Man. C.A.)

Although this principle of law is usually expressed as applying to the evidence of defence witnesses, it would be more correct to describe it as applying to exculpatory evidence, whether given by Crown or defence witnesses. Exculpatory evidence given by a Crown witness does not have to be accepted in order to raise a reasonable doubt.



E15-6

EVIDENCE

## RE-EXAMINATION

### Introduction

After all other counsel have had an opportunity to cross-examine a witness, the party who put forward the witness may re-examine the witness.

Re-examination is limited to matters arising in cross-examination. Counsel during re-examination may seek to clarify or explain damaging evidence elicited during cross-examination, or dispel any incorrect impressions created by opposing counsel.

Re-examination is a difficult art, made more difficult by the fact that a witness who has been severely damaged during cross-examination is often tired, confused and unhappy, and has little desire to anything beyond getting finished as soon as possible. An attempted re-examination that fails in its aims is often worse than no re-examination at all, since it only drives home the impact of the cross-examination. For these reasons, counsel should think carefully before rising to re-examine and should only do so when absolutely necessary.

### Right of Re-Examination

The right to re-examine arises only where a witness has been cross-examined.

R. v. Moore (1984), 15 C.C.C. (3d) 541 (Ont. C.A.), leave to appeal to S.C.C. refused  
*ibid*

### Scope of Re-Examination

Re-examination must be confined to matters arising in cross-examination. Generally, new facts cannot be introduced in re-examination. The judge may, however, in his or her discretion grant leave to introduce new matters in re-examination and the opposing party may then cross-examine on the new facts.

R. v. Moore (1984), 15 C.C.C. (3d) 541 (Ont. C.A.), leave to appeal to S.C.C. refused  
*ibid*

A trial judge may decline to permit re-examination where an area could have been covered in examination-in-chief, even if the area was explored in cross-examination.

R. v. Smith (1986), 71 N.S.R. (2d) 229 (C.A.)

Where a witness gives inadmissible evidence on cross-examination, the opposing party is permitted to re-examine on the inadmissible evidence.

R. v. Noel (1903), 7 C.C.C. 309 (Ont. C.A.)

Where a witness is impeached with a prior inconsistent statement on cross-examination, counsel is entitled on re-examination to allow the witness to explain the contradictions.

R. v. Deshaies, [1966] 3 C.C.C. 176 (Que. Q.B.)

### Leading Questions

The general rule is that leading questions may not be asked in re-examination.

R. v. Moore (1984), 15 C.C.C. (3d) 541 (Ont. C.A.), leave to appeal to S.C.C. refused  
*ibid*

This rule is presumably subject to the same exceptions that permit leading questions to be asked on examination-in-chief.

See "Cross-Examination", *infra*

### Prior Consistent Statements

Evidence of prior consistent statements may be introduced in re-examination to rebut cross-examination suggesting that the witness recently fabricated his evidence.

R. v. Wannebo (1972), 7 C.C.C. (2d) 266 (B.C.C.A.)

R. v. Campbell (1977), 17 O.R. (2d) 673 (Ont. C.A.)

Prior consistent statements may also be introduced to show that evidence given by a witness that was not given during a earlier proceeding is consistent with a statement given before that earlier proceeding. This may be done to show that the omission on the prior occasion was due to forgetfulness rather than fabrication.

R. v. Kozodoy (1957), 117 C.C.C. 315 (Ont. C.A.)

### Prior Inconsistent Statement

The trial judge has a discretion to grant leave to counsel pursuant to s. 23 of the Ontario **Evidence Act** to cross-examine his or her own witness on a prior inconsistent statement during re-examination where evidence given by the witness in cross-examination was contradictory to that statement.

R. v. Cassibo (1982), 70 C.C.C. (2d) 498 (Ont. C.A.)

R. v. Moore (1984), 15 C.C.C. (3d) 541 (Ont. C.A.), leave to appeal to S.C.C. refused  
*ibid*

See "Cross-Examination", *infra*

### **Admittance of Prejudicial Information**

Cross-examination may "open the door" and allow significant and prejudicial evidence to be developed in re-examination, although such evidence would not have been admissible in examination in chief. For example, where a police officer is cross-examined with insinuations to the effect that he is an agent provocateur, he may then be asked on re-examination about his reasons for approaching the defendant. The court may thus be provided with information about the grounds of the police for suspecting the defendant.

*Cross On Evidence 7th edn.* (Butterworth's, London, 1990) at 311

### **Re-Cross-Examination**

The court has a discretion to permit re-cross-examination after re-examination, as well as after cross-examination of the witness by another counsel. It appears that such re-cross-examination will not be permitted unless some new matter arises in re-examination.

R. v. Rochester (1984), 13 C.C.C. (3d) 215 (Ont. G.S.P.)

R. v. Moore (1984), 15 C.C.C. (3d) 541 (Ont. C.A.), leave to appeal to S.C.C. refused  
*ibid*

E16-4

EVIDENCE



## REFRESHING MEMORY

### Introduction

Many witnesses, particularly professionals such as police officers, may have little or no recollection of the events about which they will be testifying, but made notes or some written record at or near the time that the event took place. This raises the issues of whether, to what extent, and under what conditions, the witness may use the notes or record to assist in giving evidence at trial.

### Methods of Using Notes

Canadian courts have slowly acknowledged a distinction drawn by Wigmore between two different ways that a witness may use notes or other materials when giving evidence. In one form, known as "present recollection revived" (or "refreshed"), the witness uses the notes to trigger his or her dormant memory of the events and then testifies based on that revived memory. In the other form, known as "past recollection recorded", the witness has no present memory of the events even after looking at the note, and can only testify that the note itself would have been made accurately and should be accepted for that reason.

R. v. McInroy and Rouse (1977), 36 C.C.C. (2d) 257, 39 C.R.N.S. 135 (B.C.C.A.)

R. v. Bengert (No. 5), (1978), 15 C.R. (3d) 21 (B.C.S.C.), aff'd (1980), 15 C.R. (3d) B.C.C.A.)

R. v. Salutin (1980), 11 C.R. (3d) 284 (Ont. C.A.)

R. v. Simons (1991), 68 C.C.C. (3d) 97 (Alta. Q.B.)

While courts refer to this distinction, many cases have confused the two categories, often describing as present recollection revived situations that are more correctly characterized as past recollection recorded. As a result, Canadian courts have tended to apply the criteria for past recollection recorded, which are more strict than those set by Wigmore for present recollection revived, to both forms.

In any event, the same record may function as both present recollection revived and past recollection recorded. For example, a police officer may use the diagram on an accident report to trigger a memory of the accident and be able to testify from that memory as to the locations of the vehicles, but in giving the licence numbers of the drivers would certainly be using the notes as past recollection recorded.

### Prerequisites for Use of Notes

There are a series of prerequisites that counsel must establish before a note or memorandum may be used as either past recollection recorded or present recollection refreshed.

1. Necessity. Where the witness seeks to use the note as present recollection refreshed, the note must be necessary to trigger the memory of the witness.

R. v. Bengert (No. 5), (1978), 15 C.R. (3d) 21 (B.C.S.C.), aff'd (1980), 15 C.R. (3d) B.C.C.A.)

Where the witness seeks to use the note as past recollection recorded, the witness must have no present memory of the matter.

Fleming v. Toronto Railway Co. (1911), 25 O.L.R. 316 (Ont. C.A.)

R. v. Alward (1976), 32 C.C.C. (2d) 416 (N.B.S.C.A.D.), aff'd on other grounds (1977), 35 C.C.C. (2d) 392 (S.C.C.)

2. Contemporaneity. Where the witness seeks to use the note as present recollection refreshed, it has been argued that it is not necessary that the note have been made at a time when the matter was fresh in the mind of the witness, since all the note need do is stimulate the actual memory of the witness.

R. v. Bengert (No. 5), (1978), 15 C.R. (3d) 21 (B.C.S.C.), aff'd (1980), 15 C.R. (3d) B.C.C.A.)

However, this view has not been accepted in Ontario. In Ontario and some other provinces, even for present recollection refreshed, the note must have been made at a time when the events being recorded were fresh in the mind of the witness.

R. v. Gwozdowski (1972), 10 C.C.C. (2d) 434 (Ont. C.A.)

R. v. Alward (1976), 32 C.C.C. (2d) 416 (N.B.S.C.A.D.), aff'd on other grounds (1977), 35 C.C.C. (2d) 392 (S.C.C.)

Where the witness seeks to use a note as past recollection recorded, the note must have been made at a time when the matter was still fresh in the mind of the witness.

R. v. Alward (1976), 32 C.C.C. (2d) 416 (N.B.S.C.A.D.), aff'd on other grounds (1977), 35 C.C.C. (2d) 392 (S.C.C.)

3. Accuracy. At least in Ontario, for present recollection refreshed, the witness must have been able to verify the accuracy of the note at the time the note was made.

R. v. Gwozdowski (1972), 10 C.C.C. (2d) 434 (Ont. C.A.)

For past recollection recorded, the witness must be prepared to confirm the accuracy and veracity of the record based on the knowledge of the witness at the time it was made.

Fleming v. Toronto Railway Co. (1911), 25 O.L.R. 17 (Ont. C.A.)

R. v. Alward (1976), 32 C.C.C. (2d) 416 (N.B.S.C.A.D.), aff'd on other grounds (1977), 35 C.C.C. (2d) 392 (S.C.C.)

R. v. Rouse and McInroy (1977), 36 C.C.C. (2d) 257 (B.C.C.A.)

### Examples of Past Recollection Recorded

1. A report completed and signed by a witness that he had made an earlier inspection should have been admitted even though the witness could not remember the actual inspection.

Fleming v. Toronto Railway Co. (1911), 25 O.L.R. 317 (Ont. C.A.)

2. A record of a serial number of a watch, made contemporaneously with the event recorded and verified as being true at that time, constitutes past recollection recorded and must be produced at trial.

R. v. Alward (1976), 32 C.C.C. (2d) 416 (N.B.S.C.A.D.), aff'd on other grounds (1977), 35 C.C.C. (2d) 392 (S.C.C.)

### Qualifying Notes

Before any witness refers to notes (whether as present recollection refreshed or past recollection recorded), counsel should qualify the notes by first asking questions to lay the appropriate foundation and then obtaining the court's permission for the witness to use the notes. If this is not done in full, then counsel should at least obtain an acknowledgement from opposing counsel that the witness may use the notes. Where the evidence is particularly significant, it may be useful to properly qualify the notes, since this may affect the weight that is given to the evidence.

Exactly how the notes are qualified will depend on whether the witness seeks to use them as present recollection refreshed or past recollection recorded. The following series of questions may be used to qualify a police officer's notes for either form, depending upon the answers received.

1. Did you make any notes of your investigation?
2. What did you write the notes on? (duty book, occurrence reports, etc.)
3. When were the notes made in relation to what they describe?
4. Were the events fresh in your mind at that time?
5. Were the notes made accurately, to the best of your ability?
6. Have there been any additions, deletions, corrections, or changes to the notes?
7. Do you have the original notes with you?
8. Why do you want to use the notes?
9. Apart from the notes, do you have any recollection of these events?

Suitably modified, these questions may be used to qualify notes made by witnesses other than police officers. After asking these, and any additional questions arising out of the answers, ensure that once defence counsel has been given an opportunity to cross-examine on the making of the notes that the court gives a specific ruling permitting the witness to use the notes.

There is some authority that suggests that if the notes are not properly qualified, the court may reject the evidence of the witness even if no objection was taken to the evidence at the time it was led.

R. v. Maxwell (unreported, Ont. Prov. Ct., Jan. 8, 1988, per Payne P.C.J.)

R. v. Fleming (1972), 7 C.C.C. (2d) 57 (N.S.Co.Ct.)

However, the better view is that, at least where the defendant is represented by counsel or an agent, any objection to the evidence must be taken at the time it is led. Counsel may not "lie in the weeds" by failing to object when the evidence goes in but arguing that the evidence is inadmissible after the Crown has closed its case.

R. v. Jenei (unreported, Ont. Prov. Ct., Jan. 23, 1989, per Grossi P.C.J.)

R. v. Metallo (unreported, Ont. Prov. Ct., May 5, 1989, per Harris P.C.J.)

R. v. Holmes (1989), 99 A.R. 106 (Alta. Q.B.)

R. v. Kutynec (1992), 70 C.C.C. (3d) 289 (Ont. C.A.)

### **Prior Use of Notes**

Once notes have been properly qualified, a witness should be permitted to use them to assist in giving evidence. The fact that the witness had gone over the notes outside the courtroom before they were qualified is not a valid reason for the court to refuse to allow the witness to use the properly qualified notes while giving evidence.

R. v. Waters (unreported, Ont. Prov. Ct., Feb. 27, 1987, per Harris P.C.J.)

### **Use of Copies of Notes**

If a witness could refer to a document as either present recollection refreshed or past recollection recorded, then the witness may refer to a carbon copy of the document. The carbon would be as accurate as the original.

R. v. Alward (1976), 32 C.C.C. (2d) 416 (N.B.S.C.A.D.), aff'd on other grounds (1977), 35 C.C.C. (2d) 392 (S.C.C.)

Since this decision is based on the accuracy of the process used, the same



principles would presumably apply to the use of photocopies.

### Use of Transcriptions of Notes

A witness may occasionally make rough notes and then later have these transcribed, either by himself or another person. The witness may refer to the transcription to give evidence provided that he reviewed the transcription at a time when the events were still fresh in his memory and verified its accuracy.

R. v. Elder (1925), 44 C.C.C. 75 (Man. C.A.)

R. v. Kearns (1945), 84 C.C.C. 357 (B.C.C.A.)

Archibald v. R. (1956), 116 C.C.C. 62 (Que. S.C.)

R. v. Hanaway (1980), 63 C.C.C. (2d) 44 (Ont. Dist. Ct.), leave to appeal refused *ibid* at 55

### Use of Notes Prepared by Others

A witness may use a note prepared by another person as either present recollection refreshed or past recollection recorded, provided that the witness verified the accuracy of the note at a time when the subject matter of the note was still fresh in the memory of the witness.

R. v. Skwarchuk (1942), 78 C.C.C. 383 (Sask. Dist. Ct.)

R. v. Davey, [1970] 2 C.C.C. 351 (B.C.S.C.)

R. v. Gwozdowski (1972), 10 C.C.C. (2d) 434 (Ont. C.A.)

The witness may verify the accuracy of the note by reading it, by having it read to them, or by hearing it read to a third party. The method used to verify the accuracy of the note goes to the weight of the evidence, not the admissibility.

R. v. Davey, [1970] 2 C.C.C. 351 (B.C.S.C.)

### Use of Notes Prepared Jointly

It was formerly held that a witness may refer to notes prepared jointly with another person to refresh memory, provided that the witness can confirm that the notes were a correct account of what the witness testifying observed.

Archibald v. R. (1956), 116 C.C.C. 62 (Que. S.C.)

R. v. Hanaway (1980), 63 C.C.C. (2d) 44 (Ont. Dist. Ct.), leave to appeal refused *ibid* at 55



More recently, the Ontario Court of Appeal has described a process where one officer simply copied the notes of another officer as "unsatisfactory", and held that wherever possible, every officer who will want to refer to notes for the purpose of refreshing memory should make contemporaneous, independent notes.

R. v. Barrett (unreported, Ont. C.A., April 27, 1993)

### Use of Tape Recordings

A witness may use a tape recording to refresh memory in the same way that written notes may be used.

R. v. Ruddick (1980), 57 C.C.C. (2d) 421 (Ont. C.A.), leave to appeal to S.C.C. refused *ibid*

R. v. Hanaway (1980), 63 C.C.C. (2d) 44 (Ont. Dist. Ct.), leave to appeal refused *ibid* at 55

### Entering Material as Exhibit

Where the note is used as present recollection refreshed, it is the testimony of the witness that is the evidence, and the note should not be made an exhibit. Where the note is used as past recollection recorded, it is the note itself that is the evidence, and the note should be made an exhibit.

R. v. Alward (1976), 32 C.C.C. (2d) 416 (N.B.S.C.A.D.), aff'd on other grounds (1977), 35 C.C.C. (2d) 392 (S.C.C.)

R. v. Ruddick (1980), 57 C.C.C. (2d) 421 (Ont. C.A.), leave to appeal to S.C.C. refused *ibid*

R. v. Salutin (1980), 11 C.R. (3d) 284 (Ont. C.A.)

### Refreshing Memory from Transcripts of Earlier Hearing

A witness in examination-in-chief may at the discretion of the court refresh memory by referring to a transcript of evidence given in a previous proceeding, or at an earlier stage in the same proceeding, either before or during the trial. This may be done at the request of the witness or, subject to the discretion of the trial judge, by counsel drawing the attention of the witness to the relevant portion of the transcript. Counsel should not read the transcript to the witness and ask if the witness agrees with it.

R. v. Laurin (No.5) (1903), 6 C.C.C. 135 (Que. K.B.)

R. v. Marshall, [1965] 4 C.C.C. 35 (Alta. Dist. Ct.)

Reference Re R. v. Coffin (1956), 114 C.C.C. 1 (S.C.C.)

R. v. Husbands (1973), 24 C.R.N.S. 188 (Ont. Co.Ct.)

Re Ruby (1983), 43 O.R. (2d) 277 (Ont. Surr. Ct.)

R. v. Booth (1984), 15 C.C.C. (3d) 237 (B.C.C.A.)

The use of transcripts in this manner is not the same as the use of a transcript to impeach an adverse or hostile witness pursuant to s. 23 of the **Evidence Act**, since the goal is not to impeach the witness or force the witness to adopt a statement that the witness does not wish to, but to refresh the memory of an honest but forgetful witness. Accordingly, it is not necessary to meet the prerequisites of that section and show that the witness is adverse. The party seeking to show the witness the transcript need only establish that the memory of the witness was better at the time of the earlier proceeding and that the transcript would assist the witness.

Reference Re R. v. Coffin (1956), 23 C.R. 1 (S.C.C.)

Re Ruby (1983), 43 O.R. (2d) 277 (Ont. Surr. Ct.)

R. v. Booth (1984), 15 C.C.C. (3d) 237 (B.C.C.A.)

Where the witness has had an opportunity to review the transcript and it becomes apparent that the witness is not honestly forgetful but is adverse, the procedure under s. 23 of the **Evidence Act** should then be used. The witness should not be cross-examined on the prior transcript until a ruling of adversity is obtained.

R. v. Booth (1984), 15 C.C.C. (3d) 237 (B.C.C.A.)

The fact that the witness has had an opportunity to review the transcript before coming to court may affect the weight of the evidence of the witness, but does not affect its admissibility.

R. v. Husbands (1973), 24 C.R.N.S. 188 (Ont. Co. Ct.)

It has been pointed out that this opportunity to consult transcripts is an exception to the general principle that documents used to refresh memory must have been made at a time when the events were fresh in the mind of the witness.

R. v. Husbands (1973), 24 C.R.N.S. 188 (Ont. Co. Ct.)

### **Use of Inadmissible Evidence to Refresh Memory**

A witness may use a document to refresh memory although the document itself is inadmissible.

R. v. Gallant (1944), 83 C.C.C. 49 (P.E.I.S.C.)

It should be noted that this principle only applies where the document may properly be used to refresh memory and the evidence is otherwise admissible through the witness. This principle may not be used to adduce otherwise inadmissible evidence.

### The "Licence Plate" Problem

The so-called "licence plate problem" arises where the person who observed some matter is not the person who made a note of the observation. It typically arises where one person observes the number on the licence plate of a car and tells that to another person who writes it down. By the time that the observer testifies at trial, he or she cannot remember the number. If the observer saw the note while the number was still fresh in their mind, and verified its correctness at that time, there is no problem since (on the principles discussed in "Use of Notes Made by Others", above) the observer may use the note to refresh memory. The problem arises where the observer never checked the correctness of the note. Can either the observer or the recorder testify as to the number? While courts have generally accepted such evidence, they have used different theories to do so.

In Ontario and British Columbia, it has been held that there is no hearsay problem provided that both the observer and the recorder testify at trial. The observer's evidence that he gave the information to the recorder does not involve any hearsay: he is simply relating what he did. The recorder's evidence of the number that he heard and accurately recorded does not involve any hearsay: while he is relating what was said to him by another person, he is not doing so to prove the truth of the contents of the statement, but just to prove what was said. No hearsay is involved.

R. v. Penno (1977), 35 C.C.C. (2d) 266, 37 C.R.N.S. (B.C.C.A.), overruling on this issue

R. v. Davey, [1970] 2 C.C.C. 351 (B.C.S.C.)

R. v. Austin (unreported, Ont. H.C., June 16, 1980, per O'Leary J.)

R. v. Schantz (1983), 34 C.R. (3d) 370 (Ont. Co. Ct.)

In Alberta, the evidence has been held to be admissible as an exception to the hearsay rule. Provided that both the observer and the recorder are present at trial and can testify as to the accuracy with which they performed their respective roles, the evidence is admissible.

R. v. Simons (1991), 68 C.C.C. (3d) 97 (Alta. Q.B.)

Whichever reasoning is used, the result is the same. Provided both the observer and the recorder give evidence as to the accuracy of what they did, the number is admissible.

While this situation often involves licence numbers, it is not limited to such cases. It applies wherever one person relates information and another person records it. For example, it applies to a stock inventory where one person calls out numbers and another writes them down.

R. v. Penno (1977), 35 C.C.C. (2d) 266, 37 C.R.N.S. (B.C.C.A.)

## Production of Documents used to Refresh Memory

A series of cases has considered whether a party cross-examining a witness is entitled to inspect any material used to refresh memory and to cross-examine the witness on it. These authorities have been rendered largely irrelevant with respect to Crown witnesses: however broad the constitutional obligation of disclosure by the Crown may be, it surely must extend to material used by a witness to refresh memory.

R. v. Stinchcombe (1991), 68 C.C.C. (3d) 1 (S.C.C.)

However, these authorities remain relevant to the extent that they apply to the duty of defence witnesses to produce, on request by the Crown, material that they have used to refresh their memories prior to or during testifying.

Generally, where a witness uses material to refresh memory while testifying, the opposing party is entitled to inspect the document and to cross-examine the witness on those portions of the document used to refresh memory. Counsel may also cross-examine the witness on other parts of the document.

McLean v. Merchants Bank of Canada (1916), 27 D.L.R. 156 (Alta. S.C.A.D.)

R. v. Vallillee (1954), 107 C.C.C. 405, 18 C.R. 1 (Ont. C.A.)

R. v. Catling (1984), 29 C.C.C. 168 (Alta. Q.B.)

This principle is not limited to materials actually used to refresh memory while the witness testifies. It also applies to materials that the witness reviewed prior to testifying, provided that the purpose for reviewing the materials was to refresh the memory of the witness in giving evidence at trial.

R. v. Kerenko, [1963] 3 C.C.C. 52, 45 C.R. 291 (Man. C.A.)

R. v. Monfils (1971), 4 C.C.C. (2d) 163 (Ont. C.A.)

R. v. Catling (1984), 29 C.C.C. (3d) 168 (Alta. Q.B.)

R. v. Connick (1987), 84 N.B.R. (2d) 336 (N.B.Q.B.)

R. v. Campbell (1989), 76 N.P.E.I.R. 346 (P.E.I.T.D.), aff'd on other grounds (1989), 53 C.C.C. (3d) 93 (P.E.I.C.A.)

The important issue is not the time at which the materials were reviewed, but the purpose for which they were reviewed. If the material was reviewed in order to refresh the memory of the witness in giving evidence, the notes must be produced on request. Before making the request, the proper groundwork should be laid. Cross-examining counsel should get the witness to admit when and why the notes were reviewed.



While the above cases deal specifically with production by Crown witnesses, it is submitted that the duty to produce applies equally to defence witnesses (except the defendant, for reasons noted in "Production and Claims of Privilege", below). The Ontario Court of Appeal has held that the duty applies to "any...witness before the Court".

R. v. Monfils (1971), 4 C.C.C. (2d) 163 (Ont. C.A.)

This duty of production arises out of general principles of fairness in advocacy, and is not connected to any principle of Crown disclosure. Indeed, most of the cases on the issue arose before there was any formal obligation on the Crown to disclose: the duty of production allowed defence counsel access to material they would not otherwise see. There is no reason why the Crown should not be able to obtain production in the same manner.

In Ontario, the duty to provide materials used by defence witnesses other than the defendant to refresh memory has been implicitly recognized, subject to any applicable claims of privilege.

R. v. Ticchiarelli (1990), 1 O.R. (3d) 595 (Ont. Dist. Ct.)

### **Production and Claims of Privilege**

Defence counsel may try to assert a claim of solicitor-client privilege to resist production of notes used by defence witnesses to refresh memory. Solicitor-client privilege attaches to any notes made by the defendant and used by him to refresh his own memory. The Crown is not entitled to have such notes produced, or to inspect them.

R. v. Parker (1985), 10 O.A.C. 156 (Ont. C.A.)

R. v. Ticchiarelli (1990), 1 O.R. (3d) 595 (Ont. Dist. Ct.)

However, solicitor-client privilege does not extend to material used by a defence witness other than the defendant to refresh memory. If the witness uses the material to refresh memory, the Crown is entitled to have the material produced and to cross-examine the witness on it.

R. v. Ticchiarelli (1990), 1 O.R. (3d) 595 (Ont. Dist. Ct.)



## RELEVANCE

### Introduction

Relevance refers to the relationship between a piece of evidence and the fact that that is sought to be proved by it. There is no specific legal test for relevance. Common sense and logic must be applied to determine the whether a particular piece of evidence is relevant.

Some academic writers draw a distinction between relevance and materiality. In this view, "relevance" refers to whether the evidence relates to the fact sought to be proved, and "materiality" refers to whether the fact sought to be proved relates to the issues at trial. The distinction is generally not made by the courts, who tend to use the two terms interchangeably.

### Meaning of Relevance

Relevance refers to the relationship between evidence and facts sought to be proved. Evidence is relevant if it has any tendency, as a matter of logic and common sense, to assist in proving a fact in issue.

R. v. Corbett (1988), 42 C.C.C. (3d) 385

It has been pointed out that evidence may be relevant if it goes directly or circumstantially toward proving a fact in issue, if it goes directly or circumstantially toward proving some matter that is probative of a fact in issue (e.g., evidence of motive), if it goes to the credibility of a witness, or if it goes toward establishing a condition of admissibility of some other piece of evidence (for example, evidence that supports the voluntariness of a confession).

Doherty J., "Relevance" in *Evidence in Criminal Cases* (Toronto, L.S.U.C., 1989), at D-6

### Relevance and Admissibility

Relevance and admissibility are not synonymous. However, relevance and admissibility are closely related, since relevance is the basic prerequisite for admissibility. The central principle of the law of evidence is that no evidence should be admitted which is not relevant to some matter in issue, and all relevant evidence should be admitted unless its exclusion can be justified on some ground of law or policy.

Morris v. R. (1983), 7 C.C.C. (3d) 97 (S.C.C.)

R. v. Seaboyer (1991), 66 C.C.C. (3d) 321 (S.C.C.)

## Relevance and Probative Weight

Relevance refers to the existence of a relationship between evidence and facts sought to be proved, not the strength of that relationship. While courts have referred to "real probative value", it is now clear that the concept of relevance does not involve any consideration of how far the evidence supports the fact sought to be proved. There is no minimum standard of proof necessary for evidence to be relevant.

Cloutier v. R. (1979), 48 C.C.C. (2d) 1 (S.C.C.)

Morris v. R. (1983), 7 C.C.C. (3d) 97 (S.C.C.)

Corbett v. R. (1988), 41 C.C.C. (3d) 385 (S.C.C.)

An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. It need not even make that proposition appear more probable than not. Whether the entire body of one party's evidence is sufficient to go to the jury is one question. Whether a particular item of evidence is relevant to his case is quite another. It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence. Even after the probative force of the evidence is spent, the proposition for which it is offered can still appear quite improbable. Thus, the common objection that the inference for which the fact is offered "does not necessarily follow" is untenable. It poses a standard of conclusiveness that very few single items of circumstantial evidence could ever meet. A brick is not a wall.

*McCormick on Evidence*, 3rd. ed. (1984), at p. 542, quoted with approval in R. v. Young (unreported, Ont. Gen. Div., Feb. 12, 1991, per Moldaver J.)

## Relevance on Multiple Grounds

Where evidence is relevant and admissible for some purposes but not for others, the evidence is admissible for the legitimate purpose only. In such circumstances, the trier of fact should direct himself or herself on the uses to which the evidence may be put.

R. v. Corbett (1988), 41 C.C.C. (3d) 385 (S.C.C.)

### Conditional Relevance

A particular item of evidence may only be relevant when taken together with other evidence that has not yet been led. The court may conditionally admit the evidence upon an undertaking by the party leading the evidence to establish its relevance through the other evidence. If the later evidence does not demonstrate its relevance, the earlier evidence must be ignored by the court.

R. v. Dass (1979), 8 C.R. (3d) 224 (Man. C.A.)

### Discretion to Exclude Relevant Evidence

As noted above, the basic rule of admissibility is that all relevant evidence is admissible unless excluded by some clear ground of policy or law. The law of evidence is largely made up of specific exclusionary rules. There is an issue as to whether a court has in addition a general discretion to exclude relevant evidence on the ground of prejudice. It has long been clear that the court has a discretion to exclude evidence gravely prejudicial to the defendant where admissibility of the evidence is tenuous and its probative value is trifling.

R. v. Wray, [1970] 4 C.C.C. 1, [1971] S.C.R. 272

A series of recent cases in the Supreme Court of Canada has now broadened this power. The discretion is not limited to situations where the probative value of the evidence is trifling or its admissibility is tenuous. The court now clearly has the power to exclude relevant evidence led by the crown where, on balance, the prejudicial effect of that evidence exceeds its probative value.

R. v. Sang, [1980] A.C. 402 (H.L.)

R. v. Morris (1983), 7 C.C.C. (3d) 97 (S.C.C.)

R. v. Corbett (1988), 42 C.C.C. (3d) 385 (S.C.C.)

R. v. Potvin (1989), 47 C.C.C. (3d) 289 (S.C.C.)

R. v. Seaboyer (1991), 66 C.C.C. (3d) 321 (S.C.C.)

Evidence led by the defence may only be excluded on the more restrictive standard that the prejudice resulting from its admission *substantially* outweighs the probative value of the evidence.

R. v. Seaboyer (1991), 66 C.C.C. (3d) 321 (S.C.C.)

It should be noted that this test for the admissibility of defence evidence was set out in a context where the issue was fairness to the integrity of the trial and the complainant in sexual assault cases. It is not clear which of the two tests applies where the alleged prejudice is to a co-defendant.



## RE-OPENING

### Introduction

A motion to re-open the case is distinct from a motion to lead reply evidence. A party will move to re-open its case when it wishes to lead evidence that should have formed part of its case in chief, or to lead new evidence relevant to its case in chief that only becomes available after it has closed its case. A motion to lead reply evidence, on the other hand, is made where the Crown seeks to lead evidence to rebut some matter raised for the first time in the case for the defence. Such motions are discussed in "Reply Evidence", *infra*.

Before 1978, some courts were reluctant to permit the Crown to reopen its case unless some matter arose that could not have been foreseen by counsel. In that year, however, the Supreme Court of Canada made it clear that the test was not so narrowly limited. Unfortunately, the court failed to set out clearly the test for when re-opening would be appropriate.

### Discretion of the Trial Judge

The decision whether to allow the Crown to re-open its case is a matter for the discretion of the court.

R. v. Gregoire (1927), 47 C.C.C. 288 (Ont. C.A.)

R. v. Ash-Temple Co. et al. (1949), 93 C.C.C. 267 (Ont. C.A.)

Robillard v. R. (1978), 41 C.C.C. (2d) 1 (S.C.C.)

This discretionary power will not be interfered with on appeal unless an actual injustice has occurred. (Note that "actual injustice" is the test applied on appellate review, not the test to be applied by the trial court considering the motion to re-open.)

Robillard v. R. (1978), 41 C.C.C. (2d) 1 (S.C.C.)

However, it is an error for the court on its own initiative to order that the Crown's case be re-opened. The court should wait for a motion by the Crown before exercising its discretion.

Cormier v. R. (1968), 6 C.R.N.S. 202 (Que. C.A.)



### Test for Re-Opening

The discretion to permit the Crown to reopen its case is not limited to matters that arise "*ex improviso*", which no human ingenuity could have foreseen", but extends to omissions (even significant omissions) due to inadvertence.

Robillard v. R. (1978), 41 C.C.C. (2d) 1 (S.C.C.)

While the courts have not formulated a precise test, it seems that the crucial consideration is whether the additional evidence would be unfairly prejudicial to the defendant. This involves a consideration of the nature of the evidence as a whole. Re-opening to allow the Crown to prove a formal requisite to the admissibility of some evidence already given will generally not be unfairly prejudicial to the defendant, but the power to permit re-opening is not limited to such matters.

Robillard v. R. (1978), 41 C.C.C. (2d) 1 (S.C.C.)

R. v. Assu (1981), 64 C.C.C. (2d) 95 (B.C.C.A.)

R. v. Huluszkiw (1962), 133 C.C.C. 244 (Ont. C.A.)

There is a distinction between situations where the evidence sought to be adduced merely fills some gap in the Crown's case, without changing the overall nature of the case, and situations where the evidence sought to be adduced would fundamentally change the nature or thrust of the Crown's case.

The Crown should not be permitted to re-open its case to lead evidence that materially changes the nature of the case against the defendant. For example, where the defence discloses an alibi after the close of the Crown's case, the Crown should not be permitted to re-open its case to lead evidence of a different offence date.

R. v. P.(M.B.) (1992), 72 C.C.C. (3d) 121 (Ont. C.A.)

### Conduct of Defence Counsel

The conduct of defence counsel is relevant to whether the Crown should be permitted to re-open its case. In particular, where evidence that requires certain prerequisites to admissibility is led without objection from the defence, and an objection based on the failure to establish the prerequisites is only taken after the Crown has closed its case, it is proper to allow the Crown to re-open its case to prove the prerequisite.

On the other hand, a motion to re-open the case to prove the prerequisite to some piece of evidence may properly be refused where the defence initially objected to the lack of foundation for the evidence.

R. v. Ash-Temple Co. (1949), 93 C.C.C. 267, 8 C.R. 66 (Ont. C.A.)

### Timing of Motion

A motion to re-open may be made before or during a motion for non-suit. It may be made even after the defence has called evidence, or elected not to call witnesses and has closed its case.

R. v. Robillard (1978), 41 C.C.C. (2d) 1 (S.C.C.)

There is some authority that a motion to re-open the Crown's case may be made even after a motion to dismiss (nonsuit motion) has been allowed.

R. v. Loughheed Village Holdings Limited (1981), 58 C.P.R. (2d) 108 (B.C. Prov. Ct)  
aff'd on other grounds, (1981), 59 C.P.R. (2d) 99 (B.C. Co. Ct.)

However, it is very doubtful whether this case is correct on this point (note that, although the court entertained the motion, it denied it on the merits). The court seems to confuse the situation before it with the situation where the motion to re-open is made after a defence motion to dismiss but before the motion has been ruled on. Once a motion to dismiss has been granted, the court should be *functus*.

It has been suggested that the onus on the Crown to show lack of unfair prejudice is greater after the defence has closed its case.

R. v. Huluszkiw (1962), 133 C.C.C. 244 (Ont. C.A.)

Crawford v. R. (1984), 33 M.V.R. 45 (Ont. Co. Ct.)

### Evidence by Defence Following Re-Opening

A court may permit the defence to lead additional evidence after the Crown has re-opened its case. The additional evidence need not be limited to the issue raised during the re-opening.

Robillard v. R. (1978), 41 C.C.C. (2d) 1 (S.C.C.)

Arguably, this power significantly reduces the range of situations where prejudice to the defendant can be said to be "unfair".

### Re-Opening of Voir Dire

A trial judge is not *functus* on a voir dire once a ruling on admissibility has been made. The voir dire may be re-opened to permit further evidence even after the ruling.

R. v. Hunter (1981), 58 C.C.C. (2d) 190 (Ont. C.A.)

## New Evidence

The court may permit the Crown to re-open its case to call witnesses that it did not know about, and could not have known about, if the witnesses come forward after the Crown has closed its case. If such witnesses are called, the defence should be permitted to call evidence in reply.

Thatcher v. R. (1986), 24 C.C.C. (3d) 449 (Sask. C.A.) aff'd on other grounds (1987), 32 C.C.C. (3d) 481 (S.C.C.)

R. v. Noskye (1986), 69 A.R. 186 (C.A.), leave to appeal to S.C.C. refused (1986), 72 A.R. 365.

## Re-Opening the Defence

A court has the discretion to permit the defence to re-open its case after the defence has closed its case and counsel have made their submissions, at least where the evidence sought to be led was not available earlier. In deciding whether to permit the defence to re-open, the court may consider the relevance of the evidence, the effects of delay and inconvenience, any prejudice that might result to a co-defendant, and the need to have trials proceed in a reasonably expeditious and orderly manner.

R. v. Scott (1990), 61 C.C.C. (3d) 300 (S.C.C.)

The court may permit the defence to re-open its case after a finding of guilt. The court is not *functus* until sentence has been pronounced. However, this re-opening should be permitted only in exceptional circumstances.

R. v. Lessard (1976), 30 C.C.C. (2d) 70 (Ont. C.A.)

## Examples of re-opening

Where the young witness for the prosecution had repeatedly pointed to the accused identifying them and where the accused had nodded in assent to their names and dates of birth being read onto the record, the failure of the Crown to properly identify the accused was not fatal to the case. As defence would have an opportunity to cross-examine the witness no prejudice would result in allowing the Crown to re-open their case.

Protection de la jeunesse-449, [1990] R.J.Q. 2367 (C.Q.)

Where the Crown sought to re-open the prosecution to bring fresh evidence indicating the link between an accused and a vehicle allegedly used in the offence and the failure to bring this evidence earlier was not the result of inadvertence or lack of appreciation, the Crown's motion for re-opening was not allowed.

R. c. Rheume (1987), 18 Q.A.C. 161

Where two witnesses previously unknown to either side came forth with relevant testimony, the Crown application to re-open was allowed .

R. v. Noskiye (1986), 69 A.R. 186 (C.A.) leave to appeal to S.C.C. refused (1986), 69 N.R. 320 (S.C.C.)

The Crown had called unconvincing testimony relating to ownership of stolen goods, and upon a demand by defence for production of the goods had failed to recall the witness to identify them, it was improper for the judge to order re-opening of the case to ascertain the truth. While the court has a duty to seek the truth, it must do so in accordance with rules of procedure.

Cormier v. R (1969), 6 C.R.N.S. 202 (Que. C.A.)

Where the Crown failed to lead evidence linking the "Robillard" referred to in evidence taken at a prior hearing with the defendant "Robillard" in the subsequent hearing, where this evidence was read onto the record at the subsequent hearing. The court held that a mere oversight was sufficient to permit re-opening.

Robillard v. R. (1978), 41 C.C.C. (2d) 1 (S.C.C.)

E19-6

EVIDENCE



## REPLY EVIDENCE

### Introduction

Reply evidence (sometimes called "rebuttal evidence") is quite distinct from re-opening the Crown's case. A motion to lead reply evidence is made when the Crown wishes to lead evidence on some new matter arising out of the case for the defence. A motion to re-open the Crown's case is made when the Crown wishes to lead evidence that should have formed part of its case in chief. Such motions are discussed in "Re-Opening", *supra*.

As well, there is often confusion between the rules governing reply evidence and the rule against rebuttal on collateral issues (the "collateral matters" rule). While the two tend to overlap in practice, they are distinct in principle. On one hand, the collateral matters rule is a rule of general application: it applies to all evidence given throughout a case, and not simply during reply. On the other hand, evidence that does not offend the collateral matters rule is not automatically admissible as reply evidence.

### The General Principle

As a general rule, the Crown must lead all of the evidence upon which it intends to rely with respect to each element of the offence to establish the guilt of the defendant as part of its case in chief. The Crown may not "split its case".

R. v. Campbell (1977), 38 C.C.C. (2d) 6 (Ont. C.A.)

John v. R. (1985), 23 C.C.C. (3d) 326 (S.C.C.)

Krause v. R. (1986), 29 C.C.C. (3d) 385 (S.C.C.)

R. v. Chaulk (1990), 62 C.C.C. (3d) 193 (S.C.C.)

There are several reasons for this general rule. It prevents the defendant from being taken by surprise, and ensures that he has an adequate opportunity to know the entire case against him. It lets him make an informed decision whether to testify, and avoids him having to testify in sur-rebuttal and expose himself to a potentially damaging second cross-examination. It also prevents a piece of evidence being unduly emphasized by its late introduction.

R. v. Campbell (1977), 38 C.C.C. (2d) 6 (Ont. C.A.)

John v. R. (1985), 23 C.C.C. (3d) 326 (S.C.C.)

Krause v. R. (1986), 29 C.C.C. (3d) 385 (S.C.C.)

### Discretion to Permit Reply Evidence

Despite this general rule stated above, the court does have a discretion to permit the Crown to call reply evidence so that each party has a opportunity to respond to the full submissions of the other.

Krause v. R. (1986), 29 C.C.C. (3d) 385 (S.C.C.)

The discretion may be exercised more freely in non-jury matters, since there is not the same danger of the last word improperly influencing the verdict.

R. v. Paczner (1956), 117 C.C.C. 309 (Ont. C.A.)

Contrary to some earlier views, reply evidence is not limited to situations where an issue arises "*ex improviso*, which no human ingenuity could foresee".

R. v. Coombs (1977), 35 C.C.C. (2d) 85 (B.C.C.A.)

R. v. Campbell (1977), 38 C.C.C. (2d) 6 (Ont. C.A.)

The factors that the court should consider when exercising its discretion are discussed in the following sections.

### Elements of the Offence

Generally, all evidence that the Crown will rely on to prove the elements of an offence (as opposed to rebutting a defence) must be led during the Crown's case.

R. v. Chaulk (1990), 62 C.C.C. (3d) 193 (S.C.C.)

R. v. Atikian (1990), 62 C.C.C. (3d) 357 (Ont. C.A.)

Evidence that merely confirms the Crown's case in chief, as opposed to rebutting some new fact or issue raised by the defence, is not admissible in reply. The mere fact that the defendant leads evidence that denies the Crown's case does not permit the Crown in reply to reiterate its case or to adduce additional evidence in support of it.

R. v. Campbell (1977), 38 C.C.C. (2d) 6 (Ont. C.A.)

R. v. Richardson (1983), 8 C.C.C. (3d) 309 (N.S.C.A.)

R. v. Lawrence (1989), 52 C.C.C. (3d) 452 (Ont. C.A.)

For example, where the issue is the degree of force necessary to cause a particular injury, and the defence has called expert evidence to contradict the Crown's expert evidence without introducing any new facts or issues, the Crown may not call further expert evidence in reply. "Bolstering one's case" through reply evidence is not permitted.

R. v. Lawrence (1989), 52 C.C.C. (3d) 452 (Ont. C.A.)

## Defence Broadening Issues

Evidence that is of only minor significance in relation to the Crown's case may become more significant as a result of evidence led by the defence. When this occurs, and the Crown could not reasonably have expected it to occur, the Crown may be permitted to lead the evidence in reply, even if strictly speaking it should have formed part of the Crown's case in chief.

R. v. Campbell (1977), 38 C.C.C. (2d) 6 (Ont. C.A.)

R. v. Sparrow (1979), 51 C.C.C. (2d) 443 (Ont. C.A.)

R. v. Wagner (1986), 26 C.C.C. (3d) 242 (Alta. C.A.), leave to appeal to S.C.C. refused *ibid*

For example, where the Crown relied on bloodstains in a vehicle as circumstantial evidence of murder, and the defence led evidence that the bloodstains had occurred at an earlier time, the age of the bloodstains became significant and a proper subject for reply evidence.

R. v. Sparrow (1979), 51 C.C.C. (2d) 443 (Ont. C.A.)

Where a complainant in a sexual assault trial testified that she had reported the assaults to her mother at the time they were occurring, and the mother testified during the defence case that the complainant had not, the Crown was permitted to adduce in reply evidence that the mother had reported the complainant's allegations to a third party at the time. The issue was not collateral since the defence was fabrication.

R. v. M.(G.W.) (1990), 58 C.C.C. (3d) 349 (Ont. C.A.)

## Evidence Rebutting Defence Evidence

Earlier authorities suggested that reply evidence was limited to evidence rebutting defence evidence that the Crown could not reasonably be expected to anticipate. This is no longer correct (if it ever was). Where the defendant raises some defence or new issue as part of his case, the Crown may call evidence to rebut the defence or issue in reply. The Crown is not required to call the evidence as part of its case in chief, even if it has been notified what the defence or issue will be or has an indication from the cross-examination of its witnesses what the defence or issue will be.

R. v. Campbell (1977), 38 C.C.C. (2d) 6 (Ont. C.A.)

R. v. Chaulk (1990), 62 C.C.C. (3d) 193 (S.C.C.)

However, if evidence sufficient to raise a defence emerges during the Crown's case in chief (for example, through cross-examination of Crown witnesses or in a statement by the defendant led by the Crown), evidence to rebut that defence should be led as part of the Crown's case in chief. It should not be saved for reply.

R. v. Wood (1986), 28 C.C.C. (3d) 65 (Ont. C.A.)

Where the Crown's case was that the defendant had thrown gasoline on his wife and then lit it, and the defence was that the wife was burned when gasoline that she threw on her husband accidentally burned her instead, the Crown was permitted to adduce expert evidence in reply to refute the defence version, even though it had been given notice of that version through the defence cross-examination of the wife.

R. v. Campbell (1977), 38 C.C.C. (2d) 6 (Ont. C.A.)

Where the defence in a drug trial was that the type of narcotic found in the possession of the defendant was not the particular species prohibited by the statute, the Crown was permitted to call reply evidence on the point.

R. v. Coombs (1977), 35 C.C.C. (2d) 85 (B.C.C.A.)

Where the defence was insanity, and one argument in support of it was that the defendant's mental state could not have been drug-induced since he was an inmate and had no access to drugs, the Crown was permitted to lead reply evidence showing that the defendant did have access to drugs.

R. v. Leboeuf (1979), 57 C.C.C. (2d) 257 (Que. C.A.)

Where the defence alleged that the offence had been committed by a third party, and led evidence of the third party's motive, the court properly permitted the Crown to lead reply evidence rebutting the alleged motive.

R. v. Simard (1978), 43 C.C.C. (2d) 474 (Que. C.A.)

### **Evidence Rebutting Alibi**

The Crown is not required to call evidence rebutting an alibi as part of its case in chief, even where it has been given notice of the alibi. The evidence may properly be called in reply.

However, where the defendant's opportunity to be in the area where the offence was committed becomes a live issue during the Crown's case, the Crown should lead evidence on that issue during its case. It is proper for the court in the exercise of its discretion not to allow reply evidence on the point.

R. v. Jackson (1987), 38 C.C.C. (3d) 91 (B.C.C.A.)



## Effect of Presumption

Where the Crown relies on a statutory presumption to establish a fact, it is not required to lead evidence to support that fact until some evidence rebutting the presumption has been adduced. At least where such evidence is first adduced during the case for the defence, the Crown should be permitted to call reply evidence to establish the presumed fact.

R. v. Chaulk (1990), 62 C.C.C. (3d) 193 (S.C.C.)

## Reply Evidence on Collateral Matters

The "collateral matters rule" holds that answers given to questions concerning collateral matters must be treated as final. The questioner must take the answer as given, and may not contradict the witness by leading evidence in reply. Generally, a matter will be collateral where it is not determinative of an issue arising from the pleadings or information, or not relevant to matters which must be proved for the determination of the case.

Krause v. R. (1986), 29 C.C.C. (3d) 385 (S.C.C.)

It is often said that a party is "bound" by the answers received to collateral questions. This is only true in the sense that the party cannot adduce evidence to contradict the answer. Neither the party nor the trier of fact is required to accept the answer as true.

Krause v. R. (1986), 29 C.C.C. (3d) 385 (S.C.C.)

It appears that testimony by a witness as to former acts and conduct generally is collateral, and may not be met by rebuttal evidence. However, testimony about former acts and conduct related to the subject matter or issues of the case is not collateral, and may be contradicted.

R. v. Demeter (1975), 25 C.C.C. (2d) 417 (Ont. C.A.), aff'd [1978] 1 S.C.R. 538 (S.C.C.)

R. v. Cassibo (1982), 70 C.C.C. (2d) 498 (Ont. C.A.)

Krause v. R. (1986), 29 C.C.C. (3d) 385 (S.C.C.)

It was formerly the law in Ontario that the rule prohibiting rebuttal evidence on collateral matters had no application where the issue, even if collateral, was raised during the examination in chief of a witness.

R. v. Gross (1973), 9 C.C.C. (2d) 122 (Ont. C.A.)



It is now clear that the collateral matters rule does apply to such evidence. A party is not entitled to call evidence to rebut matters raised in examination in chief unless the evidence falls within the normal rules governing reply evidence.

R. v. Hrechuk (1950), 98 C.C.C. 44 (Man. C.A.)

Krause v. R. (1986), 29 C.C.C. (3d) 385 (S.C.C.)

The effect of the collateral matters rule is that reply evidence may not be called to rebut the evidence of the defendant or other defence witnesses on collateral matters in order to impeach their credibility.

Latour v. R. (1976), 33 C.C.C. (2d) 377 (S.C.C.)

R. v. Perry and Franks (1977), 36 C.C.C. (2d) 209 (Ont. C.A.)

R. v. C.(M.H.) (1988), 46 C.C.C. (3d) 142 (B.C.C.A.)

### **Evidence of Bad Character**

While a defendant who puts his character in issue by leading evidence of good character may be cross-examined on specific incidents of bad character, any answers given must be treated as final. Reply evidence of specific incidents of bad character is not admissible unless it amounts to similar act evidence, or unless it is a previous conviction not admitted by the defendant (since s. 22 of the **Evidence Act** gives a statutory right to prove these).

R. v. Donovan (1991), 65 C.C.C. (3d) 511 (Ont. C.A.)

### **Sur-Rebuttal Evidence**

If the Crown has been permitted to call reply evidence, the defence may be permitted to call further evidence ("sur-rebuttal" or "counter-rebuttal") to meet issues raised for the first time by the Crown in its reply evidence.

R. v. Morgentaler (No. 4) (1973), 14 C.C.C. (2d) 455 (Que. Q.B.)

Thatcher v. R., [1986] 2 W.W.R. 97 at 182; affirmed [1987] 4 W.W.R. 193 (S.C.C.)

R. v. Ewart (1989), 52 C.C.C. (3d) 280 (B.C.C.A.)

The need for sur-rebuttal evidence should arise rarely, since the Crown's reply evidence will usually be given to meet issues raised by the defence and will be confined to those issues only. Therefore, the defence will have had notice of the particular issue when it called its case-in-chief, and sur-rebuttal evidence would therefore be merely confirmatory.

The opportunity to lead sur-rebuttal evidence may remove any potential prejudice associated with permitting the Crown to lead reply evidence.

R. v. Chaulk (1992), 62 C.C.C. (3d) 193 (S.C.C.)

This will be particularly true in non-jury matters.

### **Failure of Lawyer to Object**

A defence lawyer failing to object to reply evidence being led does not prevent the defendant from arguing that on appeal that the reply evidence was improper.

Latour v. R. (1977), 33 C.C.C. (2d) 377 (S.C.C.)



## RES GESTAE

### Introduction

The res gestae exception to the hearsay rule has been one of the least understood, yet most commonly invoked, exceptions to the hearsay rule. Because of the exception's uncertain and amorphous nature, it has been suggested that res gestae functioned as a last resort whenever counsel wanted to adduce some piece of evidence but could not find an exception that properly applied.

With the development of the new "principled exception" (discussed in "Hearsay", *supra*), it seems likely that the res gestae exception will significantly decline in importance.

"Whatever act or series of acts constitutes, or in point of time immediately accompany and terminate in the principal act charged as an offence against the accused from its inception to its consummation or final completion, or its prevention or abandonment, whether on the part of the agent or wrongdoer in order to its performance, or on that of the patient or party wronged in order to its prevention, and whatever may be said by either of the parties during the continuance of the transaction with reference to it, including herein what may be said by the suffering party, although in the absence of the accused, during the continuance of the action of the latter, actual or constructive, as e.g., in the case of flight or applications, for assistance, form part of the principal transaction, and may be given in evidence as part of the *res gestae*...

R. v. McMahon et al. (1889), 18 O.R. 502 (H.C.J.) at p.516

This type of statement is usually made by a victim or a bystander and indicates directly or indirectly the identity of the attacker.

Cross, Evidence (5th ed., 1979) p.575

The doctrine is based on two propositions -- that the human utterance is both a fact and a means of communication, and that human action may be so interwoven with words that the dissociation of the words from the action would impede the discovery of the truth.

Teper v. R., [1952] A.C. 480 (H.L.)

### Admissibility of Res Gestae Statements

A statement made by a declarant forming part of the *res gestae* of a crime is admissible regardless whether the declarant testifies and whether or not the defendant was present at the time the statement was made.

Gilbert v. R. (1907) 38 S.C.R. 284, 12 C.C.C. 127

A *res gestae* statement forming part of the transaction in question, is admissible as original evidence, that is as truth of the contents contained therein.

R. v. Wilkinson (1934), 62 C.C.C. 63, [1934] 3 D.L.R. 50, 7 M.P.R. 562 (N.S.C.A.)

*Res gestae* statements must also adhere to the general principles as an exception to the hearsay rule; there must be a circumstantial guarantee of trustworthiness and it must be reliable.

Teper v. R., [1952] A.C. 480 (H.L.)

A statement by an accused which forms part of the *res gestae* is admissible even though it may be self-serving.

R. v. Graham, [1974] S.C.R. 206, 7 C.C.C. (2d) 93

### Definition of Res Gestae

"Acts, declarations and incidents which constitute, or accompany and explain, the fact or transaction in issue, are admissible, for or against either party, as forming parts of the *res gestae*."

Phipson on Evidence (11th ed.) para. 171

*Res gestae* includes conduct as well as statements. On a charge of criminal negligence causing death, evidence that the accused skidded and swerved after hitting the victim was admissible as part of the *res gestae*.

### What constitutes Transaction

"A transaction may be a continuous one extending over a long period. In such case any words or statements accompanying such continuous transaction at any time during its continuance are admissible as part of it."

R. v. Walkem (1908), 14 C.C.C. 122 (B.C.S.C.)

Historically, the length of the transaction was defined quite narrowly. In **R. v. Bedingfield** (1879), the court held that a statement made by a victim after she departed the room from where her throat was slashed, was inadmissible as it was not said "within the transaction".

R. v. Bedingfield (1879), 14 Cox C.C. 341



However, more recent cases have broadened the transaction period. "When a situation of fact (e.g. a killing) is being considered, the question may arise when does the situation begin and when does it end. It may be arbitrary and artificial to confine the evidence to the firing of the gun or the insertion of the knife without knowing, in a broader sense, what was happening".

Ratten v. R., [1971] 3 All E.R. 801 (P.C.), at p. 806

### Requirements for Admissibility

1. The statement made must be relevant to a fact in issue, e.g. rebuts the accused's defence or demonstrates the emotional state of the victim.
2. The statement should explain or qualify the act in issue. An utterance may be part of an act. Conduct alone may be ambiguous. For example, A may be seen handing money to B but the legal significance of the handing over of the money is unclear without accompanying words to illustrate whether it was a gift or a bribe. This category of statements is only admissible if:
  - a) the words accompany the conduct;
  - b) the conduct is equivocal;
  - c) the words aid in giving legal significance to the conduct, and;
  - d) the conduct is materially independent to the issue at hand.

Morgan, Basic Problems of State and Federal Evidence (5th ed. 1976) at pp. 287-88

3. The statement must be circumstantially connected to the event, i.e., contemporaneous and spontaneous.

Ratten v. R., [1971] 3 All E.R. 810 (P.C.)

### Contemporaneity and Spontaneity

It is essential that the words sought to be proved by hearsay, should be if not absolutely contemporaneous with the action or event, at least so clearly associated with it, in time, place and circumstances that they are a part of the thing being done, and so an item of part of real evidence and not merely a reported statement.

Teper v. R., [1952] A.C. 480 (P.C.)

In a case where the deceased, after being shot and still being pursued by accused, was shouting to witnesses to "Hold on, he shot me and will do it again, hold on", evidence of this statement was held to be admissible as part of the *res gestae* as the statement was made immediately after the shooting and while the speaker was under an apprehension of further danger.

Gilbert v. R. (No. 2) (1907), 12 C.C.C. 127 (S.C.C.)

Where the deceased had been threatened in an upstairs bedroom, and had left house and gone to the neighbour's house to tell them that the accused had tried to kill her, the evidence of the victim's statements were admitted because the effort to murder her was a continuous transaction from the attack in the bedroom until it was finally consummated by the fatal shot. The statements of the deceased tended to explain the incident and corroborated other evidence.

R. v. Wilkinson (1934), 62 C.C.C. 63 (N.S.C.A.)

### Exceptions to Contemporaneity Rule

"...there is ample support for the principle that hearsay evidence may be admitted if the statement providing it was made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused."

Ratten v. R., [1971] 3 All E.R. 801 (P.C.) at 808

R. v. Clark (1983), 7 C.C.C. (3d) 46, 35 C.R. (3d) 357, 1 D.L.R. (4th) 46 (Ont. C.A.)

R. v. Slugoski (1985), 17 C.C.C. (3d) 212, 43 C.R. (3d) 368 (B.C.C.A.)

See F. Bates, *Distilling the Res Gestae* (1988), 30 C.L.Q. 276

A spontaneous utterance made after a criminal transaction has been completed is nevertheless admissible as part of the *res gestae* where the utterance is made in response to an occurrence of so startling or shocking a nature as to suspend the declarant's ability to reflect and fabricate.

Wigmore on Evidence, 3rd ed., (Chadbourn rev.), Vol. 6 (1976), p. 195

### Relaxed Rules of Contemporaneity for Children

The contemporaneity rule is substantially relaxed in respect of a statement made by a child. A child's statement may be admissible as part of the *res gestae* when it is made up to an hour after the event occurred, and after normal questioning. Also, the test for admissibility is whether the statement which the Crown desired to adduce is "reasonably necessary" and reliable. "Reasonably necessary", unlike the regular standard for adults not only relates to the unavailability or inability of the child to testify, but it also relates to where it is undesirable for the child to testify in court where doing so would seriously traumatize the child.

R. v. Khan (1990), 2 S.C.R. 531, 59 C.C.C. (3d) 92

### Use of Statement for Purposes of Identification

The evidence of a person as to identification can be given through the witness to whom identification at the scene of the crime was made. This forms part of the *res gestae* regardless of whether the statement was made before, after or during the transaction.

For example, where a victim identifies his assailant to a police officer, and on trial the victim is not called there is only the police officer testifying as to the identity of the accused, this evidence will be admitted as an exception to the hearsay rule as it forms part of the *gestae*.

R. v. Mahoney (1979), 50 C.C.C. (2d) 380 (Ont. C.A.)

R. v. Nye and Loan (1978), 66 Crim. App. R. 252 (C.A.)

### On a Possession Charge

The first oral statement made when an accused is first charged with a possession offence is admissible as part of the *res gestae* without a voir dire.

R. v. Risby, [1978] 2 S.C.R. 139 (S.C.C.)

R. v. Spencer (1973), 16 C.C.C. (2d) 29 (N.S.C.A.)



## STATEMENTS

### Introduction

Statements by a defendant are out of court declarations which are exception to the hearsay rules. They are sometimes divided into "admissions" which are statements that by themselves are not sufficient to warrant an inference of guilt, and "confessions" which disclose an accused's participation in a crime and his guilt for that crime.

When a confession is made by the accused to a person in authority, the statement will not be admissible as evidence against the accused until it has been shown, through the use of a voir dire, that the accused freely and voluntarily gave the confession.

Ibrahim v. R. [1914] A.C. 599 (Eng. Privy Council)

R. v. Sweryda (1987), 34 C.C.C. (3d) 325 (Alta. C.A.)

Klippenstein v. R., [1981] 3 W.W.R. 111 (Alta. C.A.)

### Person in Authority

A person in authority within the meaning of the rule, is someone who's threat or promise would be likely to influence the accused and thereby induce him into making a statement that he would not otherwise have made.

Admissibility of Confessions, J.A. Kaufmann, (2nd ed.) at p.54

This definition includes people who are engaged in the arrest, detention or prosecution of the accused or one who had some opportunity of influencing the cause of the prosecution.

Wilband v. R., [1967] S.C.R. 14 at 20.

The test of whether one is in a position of authority is subjective, i.e., it is not whether the person was literally in a position of authority but whether the accused actually believed that the person was in such a position.

D.P.P v. Ping Lin [1976] A.C. 574 at 595

Morris v. R. [1979] 2 S.C.R. 1041 at 1048

Although police officers are most often considered to be persons in authority by the courts, other people may fall into this category, such as:



1. An employer whose employee commits theft from him.  
Rimmer v. the Queen (1969), 7 C.R.N.S. 361 (B.C.C.A.)
2. The victim or complainant.  
Regina v. Trenholme (1920), 35 C.C.C. 341 (Que. K.B., App. Side)
3. A psychiatrist in charge of a hospital to which the accused has been remanded for psychiatric examination.  
Regina v. Conkie (1978), 39 C.C.C. (2d) 408 (Alta C.A.)
4. A social worker who is investigating a complaint of child abuse.  
R. v. Sweryda (1987), 34 C.C.C. (3d) 385
5. A spouse of a co-accused.  
Regina v. Belanger (1978) 40 C.C.C. 335 (Ont. H.C.)

Examples of persons who are not "in authority" are:

1. Physicians who have treated the accused yet who have assumed no authority over him.  
Rex v. Roadhouse (1933), 61 C.C.,C. 191 (B.C.C.A.)  
Regina v. LaFrance (1972), 19 C.R.N.S. 80 (Ont. C.A.)
2. Police informants who are placed in cells with accused persons who are unaware of their true identity.
3. A spouse of an accused.  
Rex v. McLaren (1949), 7 C.R. 402 (Alta. C.A.)
4. A nurse with whom the accused has several conversations with while in hospital.  
R. v. Parkenkar (No.2), (1974), 17 C.C.C. (2d) 113 (Sask. C.A.)

## The Purpose of a Voir Dire

Before the prosecution can adduce into evidence any statement made by the accused to a person in authority, a voir dire or a "trial within a trial" must be held to prove beyond a reasonable doubt that the statement was made freely and voluntarily.

Regina v. Gray (1987), 79 A.R. 184 (Alta. C.A.)

Rex v. Vanleishout (1943), 80 C.C.C. 361 (Ont. Co.Ct.)

A voir dire is usually held during the course of a trial when the issue of admissibility of certain evidence arises. The voir dire may be held immediately before the Crown wants to adduce the statement in evidence.

Blackwood Beverages Limited v. Regina, [1985] 2 W.W.R. 159 at 166

The question of whether a confession is free and voluntary is for the Judge (i.e., it is a question of law. The judge must also decide, as a question of law, whether there is some evidence that the statement was made. Once these preliminary matters have been decided by the Judge, the question of whether the statement is in fact true, is a question of fact to be left to the jury or trier of fact.

Admissibility of Confessions, J.A. Kaufmann, (2nd ed.) p.35

Rex v. McLaren (1949), 93 C.C.C. 296 (Alta. C.A.)

The Judge in deciding the voluntariness of the statement should consider all the evidence relating to the circumstances which may include the contents of the statement itself, since the contents may contain evidence on the issue of voluntariness.

Regina v. Fex (1973), 12 C.C.C. (2d) 239 (Ont. S.C.)

The evidence heard on the voir dire cannot be applied to the merits of the case unless both the Crown and the defence consent. Otherwise, the defendant would be given an unfair advantage since when he testifies during a voir dire his cross-examination is restricted to credibility and the matters in issue on the voir dire, but when he testifies during the trial proper he is treated as an ordinary witness, and may be cross-examined on all the facts of the case.

Regina v. Gauthier (1976), 27 C.C.C. (2d) 14 (S.C.C.)

### **Voir Dire on Exculpatory and Inculpatory Statements**

An inculpatory fact is one which incriminates the accused. An exculpatory fact is one which tends to prove him innocent of the crime with which he is charged. The law concerning the admissibility of statements to a person in authority is the same for both types of statements, i.e., all statements made by an accused to persons in authority require the necessity of a voir dire to prove voluntariness.

Piche v. the Queen, [1970] 4 C.C.C. 27 (S.C.C.)

### **No Necessity for a Voir Dire**

In view of the decision of the Supreme Court of Canada in **Erven v. the Queen**, a voir dire should be held in all cases where a statement is tendered as evidence, unless the defendant or his counsel clearly waives the holding of a voir dire.

When an accused or his counsel clearly and unequivocally indicates that the statement tendered by the prosecution was made voluntarily a voir dire is not necessary. An accused's silence cannot imply consent or a waiver of the voir dire, however, if the accused pleads guilty it is considered an implicit waiver.

Powell v. the Queen (1976) 28 C.C.C. (2d) 148 (S.C.C.)

Regina v. Park [1981] 2 S.C.R. 64

Regina v. Boyd (1983), 8 C.C.C. (3d) 143 (B.C.C.A.)

### **Procedure in a Voir Dire**

On the voir dire examination, the Crown may ask the accused on cross-examination whether or not the statement was true.

DeClerq v. the Queen [1969] 1 C.C.C. 197 (S.C.C.)

Rex. v. Hammond (1941), 28 Cr. App. R. 84 (Eng. Ct. of Crim. App.)

If the accused testifies in the voir dire, he may be cross-examined on his criminal record.

Regina v. Bell (1959), 30 C.R. 60 (B.C.S.C.)

Counsel for the accused is entitled on voir dire to examine his own witness and cross-examine Crown witnesses only to establish that a statement was made and under what circumstances it was given.

Rex v. Orel (1944), 82 C.C.C. 35 (Sask. C.A.)

The defence should be given every opportunity to cross-examine as to the circumstances leading up to the statement, such as what was said by the police and the accused.

Regina v. Dombrowski (1985) 18 C.C.C. (3d) 164 (Sask.C.A.)

## **Written Statements**

When an accused's statement is taken down in writing by a person in authority and signed by that person, it is not likely that a question will arise as to what was said by the accused as it was properly subjected to the best evidence rule.

Regina v. Fex (1973), 12 C.C.C. (2d) 239 (Ont. H.C.)

However, if the accused refuses to sign the written statement, this act does not make the statement inadmissible, although it may affect its evidentiary weight.

R.v. Vaupotic (1969), 70 W.W.R. 128 (B.C.Mag. Ct.)

If the statement was not taken down in writing and no officer made a note as to the statement or the exact circumstances surrounding its taking, the trial Judge should rule whether there is some evidence fit to go to the jury that the statement was in fact made.

Regina v. Mulligan, [1955] O.R. 240 (Ont. C.A.)

## **Use of Statement by Crown**

The discretion to call an accused's statement into court lies with the prosecutor, without taking the advice or direction of the judge. A Judge cannot direct that an accused's statement be put into evidence.

Regina v. Williams, [1971] 1 O.R. 703 (Ont. H.C.J.)

In certain cases it may be advisable to tender any or all statements made by an accused and contradict the untruthful portion with other extrinsic evidence.

Regina v. Pelletier (1986), 111 C.C.C. (3d) 533 at 538. (B.C.C.A.)

Where a confession contains some irrelevant or prejudicial fact, it does not follow that the whole confession must be excluded. The relevant statements can be severed from the rest of the statement as long as the statement still remains in its proper context.

Beatty v. the King (1944), 81 C.C.C. 1 (S.C.C.)

Where a statement made by the accused to the police is of doubtful important relevance to the Crown's case and the Crown chooses not to have a voir dire in respect of that statement nor to seek to have it introduced as part of the Crown's case, the Crown can introduce it during the case for the defence as long as there is a voir dire. The following cases establish that the Crown, after a voir dire, can use the statement during the defence case to test the credibility of the accused.

Regina v. Pappajohn, [1979] 5 C.C.C. 193 (B.C.C.A.)

Regina v. Lizotte (1980), 18 C.R. (3d) 364 (Que. C.A.)

However, the law in Ontario states that the statement cannot be tendered into evidence for the first time in rebuttal if it deals with a central issue in the case.

### Use of Statement by Accused

After an accused has been ordered to stand trial, or at his trial, the defence has the right to the production of any statement made by the accused because it may assist in the preparation of the defence, even if the prosecution does not intend to adduce the statement in evidence.

Savion v. R. (1980) 13 C.R. (3d) 259 (Ont. C.A.)

However, there is a general rule that unless the accused's statements meet the requirements of an exception to the rule against self-serving statements, it is inadmissible on the accused's own behalf.

Regina v. Smith (1986), 71 N.S.R. (2d) 229 at 235-36 (N.S.C.A.) citing  
Regina v. Graham, [1974] S.C.R. 206

The rule states: "A statement made by a defendant in reference to a criminal transaction, either before or after the transaction has taken place, is not as a rule, evidence in his favour, for where the statement is a confession of guilt, or an admission of facts tending to the proof of guilt, it is received in evidence upon the presumption that a person will not make an untrue statement against his own interest, but no such presumption arises in respect of a statement made in his own favour; otherwise a defendant could make a statement to suit his own case."

Shaw's Evidence in Criminal Cases (3rd ed.) 26.

In **Rex v. Frederick**, the defence tried to call the constable who took an exculpatory statement from the accused, to introduce it into evidence through him. On appeal from the Crown, a new trial was ordered because this statement should have been rejected as self-serving evidence. It allowed an accused to put forward a



concocted defence while escaping from cross-examination, securing the benefits of sworn evidence without incurring the consequences of perjury and this deprives the jury the benefits of appraising his credibility from his demeanour.

Rex v. Frederick (1931), 57 C.C.C. 340 (B.C.C.A.)

One exception which allows an accused to have an exculpatory statement entered is when it is suggested that the accused recently concocted or fabricated his story. In order to rebut that suggestion, the defence may then enter the accused's statement to show that he told the same story earlier.

Regina v. Giraldi (1975), 28 C.C.C. (2d) 248 (B.C.C.A.)

However, the Crown must raise the issue of recent fabrication in their cross-examination of the accused before the defence can rebut it by tendering the accused's statement.

If an accused is unrepresented, it is the duty of the trial judge, to explain, if possible, his rights including the right to call evidence.

Regina v. Carlsen (1981) 6 W.C.B. 238 (B.C.Co.Ct.)

### **Fear of Prejudice**

In the voir dire, to prove that a statement was freely and voluntarily made, the Crown must show that it was made without fear of prejudice to the accused. In the rule making statements of an accused obtained by fear inadmissible, the fear contemplated by the rule is not a fear of being caught or identified, or a fear induced by the accused's guilty conscience, but a fear of reprisal by the person in authority if he failed to talk or give the statement

Alward v. Regin, [1978] 1 S.C.R. 559

The emotional effects resulting from an arrest and custody affect only weight, not its admissibility.

Regina v. Chow (1978), 43 C.C.C. (2d) (B.C.C.A.)

The fact that the statements made by the accused is highly prejudicial to himself, do not render them any less admissible.

Regina v. Mayhew (1987), 76 N.S.R. (2d) 381 (N.S.C.A.)

## Threats or Intimidation

A statement cannot be obtained from the accused by threats or intimidation. It is immaterial whether a person in authority did not intend to make a threat or promise. If it is perceived as such by the accused, then the statement may be inadmissible as being involuntary.

D.P.P v. Ping Lin, [1976] A.C. 547 (H.L.)

In order for the threat to make the statement inadmissible, it must have been operative at the time the statement was made, as it could not be considered an inducement unless it preceded the making of the statement.

Regina v. Fraser (1986), 76 N.S.R. (2d) 22

If when a person in authority extracts a statement from the accused by using violence, it will not be considered to be voluntary. For example, using a choke hold on an individual before he confesses can give the accused a fear of intimidation.

Horvath v. the Queen (1979) 44 C.C.C. (2d) 385 (S.C.C.)

Regina v. Stone (1986) 25 C.C.C. (3d) 548 (B.C.C.A.)

Repeated accusations of guilt, contradicting previous answers etc., may create an aura of threats and involuntariness such as to make the statement inadmissible.

Rex v. Howlett (1950), 96 C.C.C. 182 (Ont. C.A.)

In **R. v. O'Neill and Ackers**, the applicants had made statements which were tantamount to confessions of guilt, but it was suggested to the police officers in cross-examination that these statements had been extracted from the appellants by threats and physical violence on the part of the police. Neither of the appellants was called to give evidence. Lord Goddard, C.J. held that "it is one thing to cross-examine properly and temperately with regard to credit...it is, however, entirely wrong to make such suggestions, namely that the police beat the prisoners until they made confessions, and then, when there is a chance for the prisoners to substantiate what has been said by going into the box, for counsel not to call them.

R. v. O'Neill and Ackers (1950), 34 Cr. App. R. 108

## Inducements

An inducement by a person in authority must be as to some advantage in the proceedings to be objectionable. The threat or hope held out by the person in authority must have been capable of inducing the accused into making a statement which may not necessarily be true. For example, if the police inform an accused that he can only go home when the police are finished with him, it may prompt the accused to make a statement simply so that he can go home.

*Regina v. Pearce* (1987), 52 Man. R. (2d) 202 (Man.Q.B.)

*Regina v. Sweryda* (1987), 34 C.C.C. (3d) 325 (Alta.C.A.)

A self-induced hope or fear does not render the statement inadmissible; it must be held out by a person in authority.

*Regina v. Dormandy* (May 15, 1980), 4 W.C.B. 477 (Ont. H.C.)

An inducement to another person with the expectation that the inducement will be and is in fact relayed to the prisoner renders the statement inadmissible.

*Regina v. Thompson*, [1893] 2 Q.B. 12 (Crown Cases Reserved)

Confessions which result from spiritual exhortations or appeals to conscience and morality are admissible and voluntary, whether urged by a person in authority or by someone else.

*Regina v. Belliveau* (1985), 58 A.R. 334 (Alta. C.A.)

## Oppression

A confession is obtained by oppression if a person in authority subjected the accused to demeaning and unnecessary treatment or an unwarranted indignity, thereby inducing the confession.

*Horvath v. R.*, [1979] 2 S.C.R. 376 at 434

In England, oppression as a distinct ground for rejecting a confession is expressly recognized.

United Kingdom Common Law Revision Committee, 11th Report on Evidence (General) Cmnd, 4991; s.60.

In Canada, in a number of appellate cases, the danger of using oppression to induce statement has been expressly recognized.

*R. v. Hebert* (1990), 57 C.C.C. (3d) 1

*Hobbins v. the Queen* (1982), 66 C.C.C. (2d) 289

## Statements Obtained by Trickery

A statement obtained by trickery is admissible if otherwise voluntarily made. However, if the trick is such as to bring the administration of justice into disrepute under s.24(2) of the **Charter** then a statement may be ruled inadmissible on that basis.

Rothman v. the Queen (1981), 59 C.C.C. (2d) 30 (S.C.C.)

Clarkson v. R., [1986] 1 S.C.R. 383

## Defendant's State of Mind

In the pre-**Charter** days, the courts used to determine the admissibility of confessions made when the accused was intoxicated, by applying either the "awareness of consequences" or the "operating mind" test. Since the induction of the **Charter** the question of whether a confession is admissible in the case of an intoxicated individual is not based on these tests, rather it is decided on whether the accused's section 10(b) right to counsel was violated.

Regina v. Clarkson, [1986] 1 S.C.R. 383

The fact that an accused was read his rights before being arrested does not automatically make any confession he gives admissible in evidence. Rather, there still remains a question of fact which must be established, that is that the confession in light of the particular circumstances of time, place, persons involved and environment was given freely and voluntarily.

R. v. Boisjoly (1955), 115 C.C.C. 264 (Que. Q.B.)

## Language Difficulties

A statement made by one whose native tongue is another language is not rendered inadmissible simply because it is taken in English. If it can be shown that the accused clearly understands and speaks English, or where it was shown that the accused understood English fairly well and that the statement was read over and explained in the accused's native tongue.

R. v. Iwanchuk (1928), 50 C.C.C. 405 (Alta. C.A.)

R. v. Davis, [1952] O.W.N. 469 (Co. Ct.)



## **The Reading of an Accused's Rights**

Where an officer has reasonable and probable grounds to believe the suspect has committed an offence and should be arrested, the officer must read the accused his rights. Since not reading an accused his rights denies an accused his section 10(b) rights, it is submitted that this type of omission will "bring the administration of justice into disrepute" and therefore will make any future confession inadmissible. (See section 24(2) of the **Charter** and the cases decided thereunder.)

Clarkson v. R., [1986] 1 S.C.R. 383

## **Statements Made Under Statutory Compulsion**

The fact that a statement by an accused to a person in authority is made under compulsion of statute, does not obviate the necessity for a voir dire to determine its voluntariness. For example, statements which are required under some statutory provisions such as sections 199 or 200 of the Highway Traffic Act are subject to the same rules of admissibility as other statements.

Walker v. the King, [1939] S.C.R. 214 at p.217

R. v. Slopek (1974), 21 C.C.C. (2d) 362 (Ont. C.A.)

## **Series of Statements**

A statement made after an earlier inadmissible statement can be admissible if it, itself, is found to be voluntary.

Regina v. Belanger (1978), 40 C.C.C. (2d) 335 (Ont. H.C.)

Hobbins v. Regina, [1982] 1 S.C.R. 553 at 557-58

However, if a subsequent statement is induced by an earlier inadmissible one, the subsequent statement is also inadmissible.

Regina v. Gariepy (1978), 40 C.C.C. (2d) 345 (Que. S.C.)

## **Statements made by Co-conspirators**

In a charge of conspiracy, the acts and statements of any one conspirator are evidence against all co-conspirators for the purpose of proving the conspiracy. However, both the existence of the conspiracy and the participation of the defendants in it must be proved independently although the order in which these two issues are proved is immaterial.

Regina v. Frost (1839), 173 E.R. 771 (Monmouth Special Commission)

Regina v. Provincial Magistrate, Ex parte Appeal, [1970] 2 C.C.C. 182 (Man.Q.B.)



If accused persons have agreed to achieve a common unlawful purpose, the acts and declarations of each accused are admissible as evidence against each other.

Koufis v. the King (1941), 76 C.C.C. 161 (S.C.C.)

Regina v. Baron and Wertman (1976), 31 C.C.C. (2d) 525 (Ont.C.A.)

### **Statements Made by Co-Accused/by Others in the Presence of the Accused**

As a general rule a statement made by a co-accused is only evidence against the person making it and is not admissible against the accused, unless the accused are charged with conspiracy or for committing a common unlawful purpose.

Regina v. Christie, [1914] A.C. 545 (H.L.)

It is only when the defendant by word or conduct, action or demeanour has accepted what the statements of co-accused contain and to the extent that he does so, that the statements made have any evidentiary value.

Stein v. the King (1928) 50 C.C.C. 311 (S.C.C.)

An accused may be deemed to have accepted a co-accused statement by either

- a) assenting to it,
- b) from his failure to deny it, or
- c) by inference from his very denial.

Regina v. Knuff (1980) 52 C.C.C. (2d) 523 (Alta. C.A.)

However, it is an error to instruct the jury that a statement made by another becomes evidence against an accused simply because he was present and acknowledged what was said, as when a statement which calls for an answer is made by a person in authority in the presence of an accused, the drawing of an inference of acceptance conflicts with the right to remain silent.

Some examples of statements made by a co-accused or another in the presence of an accused are:

1. Where a constable gave evidence that complainant, within hearing of accused, pointed out the accused and said, "That is the man!" and the constable asked, "What did he do?" and complainant described the offence. Accused replied, "I am innocent". It was held that the statement of the complainant was admissible as accepted by accused by his own words, actions and demeanour. The prosecution should lay a foundation from which the jury could infer the accused accepted the statement in whole or in part.

Rex. v. Christie, [1914] A.C. 545 (H.L.)

2. When the accused was arrested, the police officer read the charge of indecent assault to him. He was asked if he would give a statement and the accused replied, "You have it all there--there is nothing more to say." Issues on appeal were whether this oral statement was admissible and if it was corroborative of the complainant's evidence. The accused's words were admissible because they were spontaneous, not in answer to leading questions, no threats or promises made. The words were capable of being corroboration of the complainant's story.  
Regina v. Fagnoli, [1957] O.R. 140 (Ont. C.A.)
3. An accused's silence cannot be held against him because he has a constitutional right under s.7 of the **Charter** to remain quiet.

### Confirmation by Subsequent Facts

The judge must take into account all of the circumstances surrounding the making of the statement before he can rule as to its admissibility.

Boudreau v. R. (1949), 94 C.C.C. 1 (S.C.C.)

If a judge rules that a statement is inadmissible, but real evidence was found as a result of the information contained in the inadmissible statement, the finding of the articles and such part of the confession as is confirmed by the finding is held to be admissible.

R. v. Wray [1970] 4 C.C.C. 1 at p.7 and 19 (S.C.C.)

The case of **R. v. Dixon** confirms the validity of the common law since the **Charter**. In **Dixon**, the accused was charged with murder, and in the voir dire, his confession was ruled inadmissible as being involuntary. However, the portion of the statement leading the police to the body was ruled admissible. The court held that allowing the real evidence obtained from the inadmissible confession would not bring the "administration of justice into disrepute" as defined by s.24(2) of the **Charter**.

E22-14

EVIDENCE

July 1994







**TABLE OF CONTENTS****ANNOTATIONS**

BUSINESS PRACTICES ACT .....	A1-1
COMPULSORY AUTOMOBILE INSURANCE ACT .....	A2-1
DOG OWNERS' LIABILITY ACT .....	A3-1
GAME AND FISH ACT .....	A4-1
HIGHWAY TRAFFIC ACT .....	A5-1
LIQUOR LICENCE ACT .....	A6-1
TRESPASS TO PROPERTY ACT .....	A7-1
MOTORIZED SNOW VEHICLES' ACT .....	A8-1

## TABLE OF CONTENTS

**BUSINESS PRACTICES ACT****Introduction**

As well as creating certain civil remedies or powers against persons or corporations who engage in an "unfair practice" (defined in s. 2 as "a false, misleading or deceptive consumer representation" or "an unconscionable consumer representation made in respect of a particular transaction"), the **Business Practices Act** also creates certain offences.

Business Practices Act, s. 17

**Offences: s. 17(2)**

The offence created by s. 17(2) is a full *mens rea* offence, and not one of strict liability. The Crown is required to prove that the defendant knew that the consumer representation forming the subject matter of the charge was false, misleading, deceptive or unconscionable. However, there is no requirement that the defendant know of the existence or import of the **Business Practices Act**; nor is there any requirement that the Crown show that the conduct was considered by the Ministry to be an unfair practice and that the Ministry had notified the defendant accordingly.

R. v. Kester (1981), 58 C.C.C. (2d) 219 (Ont. Co.Ct.), aff'd (1982), 66 C.C.C. (2d) 384 (C.A.)

**Limitation Period: s. 17(5)**

The limitation period for offences under the **Business Practices Act** is two years from the time that the subject matter of the proceeding arose. This limitation period supersedes the general limitation period found in s. 76(1) of the **Provincial Offences Act**.

See "Limitation Periods" in **Procedure**, *supra*



**COMPULSORY AUTOMOBILE INSURANCE ACT****Definition of "Owner"**

Several of the offenses created by the **Compulsory Automobile Insurance Act** apply to the "owner" of a motor vehicle rather than the "driver". The term "owner" is not defined in the **C.A.I.A.** This gives rise to two issues:

- (a) whether the registered owner of a motor vehicle will always be an "owner" for the purposes of the offenses created by the **C.A.I.A.**;
- (b) whether any person other than the registered owner of a motor vehicle can be an "owner" for the purposes of the offenses created by the **C.A.I.A.**

On the first issue, a series of civil cases considering the predecessors to what is now s. 192 of the **Highway Traffic Act** (which governs the civil liability of the owner of a motor vehicle) have held that the registered owner of a motor vehicle will be an "owner" for the purposes of that section at least where that person has some legal title to the motor vehicle, even if the motor vehicle is in the exclusive possession of some other person and is under the dominion and control of that other person.

McEwan v. Iles (1981), 34 O.R. (2d) 325 (Co.Ct.)

Honan v. Gerhold (1974), 50 D.L.R. (3d) 582 (S.C.C.)

Budny v. Senechal (1990), 27 M.V.R. (2d) 103 (Ont. Gen. Div.)

In addition, in **R. v. Sherman** (1971, Ont. C.A.) the defendant was charged that she, being the owner of a motor vehicle, did operate it on a highway while it was not insured and where the requisite fee had not been paid under s. 3(3) of the **Motor Vehicle Accident Claims Act** (the predecessor legislation to the **C.A.I.A.**). The defendant was the registered owner but argued that she was not the "true" owner, and was merely the registered owner in order to permit her son, who exercised exclusive possession and control over the car and made all payments on it, to obtain financing. The court pointed out that the purposes of the **Motor Vehicles Accident Claims Act** could only be effected if the police could effectively ascertain the identity of the owner, and therefore "owner" must be interpreted to mean "registered owner".

However, in **R. v. Zwicker** (1994, Ont. C.A.) a woman who had recently purchased a vehicle but not yet registered as owner was held liable under s. 2(1)(a) of the new **Act**. The court held that as s. 11(1)(a) of the **Highway Traffic Act** now requires the vendor of a motor vehicle to remove his or her plates at the time of conveyance and that since the purchaser must register ownership within six days of purchase and affix their own plates in order to operate the vehicle on a highway, registration is no longer the sole means of identifying the owner of a given vehicle. As a result, the limited interpretation of "owner" is no longer applicable and must be



expanded to include common law ownership. This means that at least where title has passed from the registered owner to the purchaser, and the purchaser has not yet registered ownership of the vehicle, the "registered" owner will not always be the "owner" for the purposes of the **Act**.

Motor Vehicles Accident Claims Act, R.S.O. 1970, c. 281

R. v. Sherman (1971), 5 C.C.C. (2d) 247 (Ont. C.A.)

R. v. Zwicker (1994) (February 1, 1994, Ont. C.A.) (Unreported)

The second question, whether any person other than the registered owner can be an "owner" for the purposes of the C.A.I.A. has been answered above.

### **Compulsory Automobile Insurance: s. 2(1)**

The section prohibits an owner of a motor vehicle from (a) operating or (b) permitting the operation of a motor vehicle on a highway unless the motor vehicle is insured. The parallel legislation in other provinces has been held to create an offence of strict liability.

R. v. Blackburn (1980), 57 C.C.C. (2d) 7, 25 B.C.L.R. 218 (C.A.)

R. v. McGilvery (1979), 19 A.R. 447 (Dist. Ct.)

R. v. Litwin (1989), 101 A.R. 59 (Q.B.)

Two Newfoundland cases expand on what is necessary to raise a defence where the defendant thought the vehicle was insured. In **Carter v. R.** (1985, Nfld. Dist. Ct.), the defendant was convicted where she honestly believed, but did not check, that her husband had the vehicle insured. In **Gallagher v. R.** (1985, Nfld. Dist. Ct.), the defendant was acquitted where she was charged with an offence two days after her policy (which had been renewed several times previously) had expired. The insurance company had informed her that her file had been pulled "to be rated and renewed". The distinction seems to be that a belief is not reasonable unless there are positive grounds to believe that the insurance was still in place.

Carter v. R. (1985), 34 M.V.R. 294 (Nfld. Dist.Ct.)

Gallagher v. R. (1985), 35 M.V.R. 228 (Nfld. Dist.Ct.)

This distinction was not drawn in **R. v. Tjelta** (1983, B.C.S.C.), when the defendant was acquitted where his wife had forgotten to renew the insurance and he was unaware that the insurance had not been renewed. The court stated (at p. 277):

The learned [trial] judge found that "the accused was unaware that that insurance on the 1975 Ford automobile that he was driving on the day in question had expired". The only rational explanation one could make of this is that if one does not -- if one is not aware that the insurance had

expired one must, it follows, believe it to have been in place.

There are two problems with this reasoning. First, a person who is unaware that insurance has expired does not necessarily believe it to be in place; he may simply never have directed his mind to the question of insurance at all. Second, even if there was a belief that insurance was in place the court fails to consider the additional requirement in strict liability offenses that such a belief must be reasonable in order to provide a defence. It is submitted that the approach taken in **Carter v. R.** and **Gallagher v. R.**, as discussed above, is preferable.

R. v. Tjelta (1983), 25 M.V.R. 274 (B.C.S.C.)

In **Bibeau v. Stone** (1984, Ont. Co. Ct.) the court considered where the onus lay in proving the absence of insurance and held:

The words "unless the motor vehicle is insured under a contract of automobile insurance" I find to be words falling within the exception, exemption, excuse or qualifications contemplated by s. 730(2) [now s. 794(2)] of the **Criminal Code** and s. 48(3) of **The Provincial Offenses Act** and further that whether or not the accused has insurance is peculiarly within his knowledge and that burden of proof lies on the accused.

The court further held that while the possession of the certificate required by s. 3(1) of the **C.A.I.A.** was not in law evidence of insurance, it would almost invariably satisfy the investigating police officer's enquiry.

See generally "Exceptions, Exemptions, Authorizations and Qualifications" under **Evidence**, *supra*

Bibeau v. Stone, (unreported, Ontario County Court, Northumberland County, Jan. 16, 1984 per Murdoch Co. Ct. J.)

It has been held that the requirement placed on the defendant by this section does not violate s. 11(d) of the **Charter**, since it requires him to establish a fact that is peculiarly within his knowledge.

R. v. Horvath (1989), Vol. 10, No. 4 Criminal Lawyers' Association Newsletter 27 (Ont. Prov. Ct.)

The distinction between a "valid contract of insurance" and a "paid-up contract of insurance" was drawn in **Leger v. R.** (1982, N.B.Q.B.). The court held that the defendant had met the onus upon him to provide proof that the vehicle was covered by a contract of insurance where he produced a renewal notice stating that payment of the premium by the due date would renew the insurance. The Crown had failed to prove that the insurance company had terminated the policy in accordance with the procedures set out in the statutory conditions in the provincial **Insurance Act**, which the company

was required to do in order to invalidate the previously existing insurance.

Leger v. R. (1982), 17 M.V.R. 312 (N.B.Q.B.)

**Fail to Produce Evidence of Insurance: s. 3(1)**

A demand to produce evidence of insurance under this section does not infringe the right to be secure from unreasonable search and seizure contained in s. 8 of the **Charter**. The demand does not constitute a search since there is no intrusion on a reasonable expectation of privacy.

Canadian Charter of Rights and Freedoms, s. 8

R. v. Hufsky (1988), 40 C.C.C. (3d) 398, 4 M.V.R. (2d) 170 (S.C.C.)

**Penalties: s. 14**

This section makes non-compliance with the provisions of the **C.A.I.A.** an offence, and sets out the penalty for those offenses that do not have specific penalties.

## DOG OWNERS' LIABILITY ACT

### Introduction

The effect of the **Dog Owners' Liability Act** is threefold: it amends the common law civil liability of a dog owner where the dog has bitten a person or domestic animal; it creates a procedure by which a court can make certain orders in respect of a dog that has bitten a person or domestic animal; and it creates an offence where the owner of a dog fails to take reasonable precautions against such incidents.

### Definition of "Owner": s. 1

An "owner" is broadly defined to include a person who possesses or harbours a dog and, where the owner is a minor, the person responsible for the custody of the minor.

### Nature of Attack: s. 2

While the statute formerly applied only to attacks on a person, it now applies to attacks on "domestic animals" also. It is not clear whether "domestic animals" is limited to pets or whether it also includes, for example, poultry or livestock.

### Proceedings Against Owner of Dog: s. 4(1)

A proceeding against the owner of a dog for an order under s. 4(2) is governed by Part IX of the **Provincial Offences Act**; accordingly, the procedures under that Act (including the provisions for appeal) will apply.

### Order for Control or Destruction of Dog: s. 4(2)

After a finding that a dog has bitten or attacked a person or domestic animal, the Provincial Offences Court, if satisfied that the protection of the public requires it, may make an order under s. 4(2)(a) or (b). The criteria that the court may take into consideration in making its order are set out in s. 4(3).

### Failure to Exercise Reasonable Precautions: s. 5

Section 5, added in 1989, places a duty on the owner of a dog to exercise reasonable precautions to prevent the dog from biting or attacking a person or domestic animal, and s. 5(2) provides that a person who fails to do so will be guilty of an offence. It is not clear whether it is an element of the offence that the dog must have bitten or attacked a person or domestic animal.





**GAME AND FISH ACT****TABLE OF CONTENTS**

General .....	A4-1
Application to Federally Held Lands .....	A4-1
Application to Aboriginal Peoples .....	A4-1
Definition of "Game": s. 1 .....	A4-3
Definition of "Game Bird": s. 1 .....	A4-3
Definition of "Hunting": s. 1 .....	A4-4
Definition of "Non-Res .....	A4-8
Hunting, Use of Lights: s. 22(3) .....	A4-9
Automatic Shotguns: s. 25 .....	A4-9
Hunting in Provincial Parks: s. 26(1) .....	A4-9
Weapons in Provincial Parks: s. 26(2) .....	A4-10
Licences: s. 36 .....	A4-10
Open Seasons: s.47 .....	A4-10
Traps, Nets, Snares, etc. Prohibited: s. 48 .....	A4-10
Interference with Traps: s. 63 .....	A4-10
No Traffic in Certain Fish: s. 72 .....	A4-11
Dogs Running at Large: s. 80(1) .....	A4-11
Transport of Fish or Game Illegally Taken: s.83(2) .....	A4-11
Contravention of Act or Regulations: s. 85 .....	A4-12



## GAME AND FISH ACT

### GENERAL

#### Application to Federally Held Lands

Provincial laws respecting game and fish apply on federally held land, at least to the extent that they are not inconsistent with valid federal legislation.

R. v. Hartt (1979), 45 C.C.C. (2d) 262 (N.B.S.C. App. Div.)

R. v. Smith (1942), 78 C.C.C. 48 (Ont. C.A.)

#### Application to Aboriginal Peoples

The application of the **Game and Fish Act** to aboriginal peoples involves a complex interplay of federal legislation, provincial legislation, and treaty provisions. The general principles governing the issue are discussed below. Individual cases, however, can only be resolved by an examination of their own particular circumstances.

The starting point for any consideration of the issue is s. 88 of the **Indian Act**, R.S.C. 1985, c. I-5, which states:

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

It is now clear that s. 88 is not the sole source for the application of provincial laws to aboriginal peoples. Valid provincial laws that "can be applied to Indians without touching their Indianness" apply to aboriginal peoples by general principles of constitutional paramountcy; they do not depend on s. 88 for their validity. Section 88 only incorporates by reference legislation otherwise within the legislative competence of the province, that might regulate some of the essential capacities and rights of Indian status to the extent it would have encroached on the federal legislative jurisdiction: see **Dick v. R.** (1985, S.C.C.) **R. v. Francis** (1988, S.C.C.). Despite this rather technical distinction, the effect is the same, whether provincial legislation falls into the first or second category discussed above. Provincial laws of general application apply to aboriginal peoples to the extent that they do not conflict with treaties or valid federal legislation: see **R. v. Kruger and Manuel** (1977, S.C.C.); **R. v. Frank** (1977, S.C.C.).

The test of whether a law is one "of general application" is set out in **R. v. Kruger and Manuel**. Dickson J. for the court states (at C.C.C. p. 381)

There are two *indicia* by which to discern whether or not a provincial enactment is a law of general application. It is necessary to look first to the territorial reach of the Act. If the Act does not extend uniformly throughout the territory, the inquiry is at an end and the question is answered in the negative. If the law does extend uniformly throughout the jurisdiction the intention and effects of the enactment need to be considered. The law must not be "in relation to" one class of citizens in object and purpose. But the fact that a law may have graver consequences for one person than for another does not, on that account alone, make the law have a uniform impact. The line is crossed, however, when an enactment, though in relation to another matter, by its effect, impairs the status or capacity of a particular group.

Generally, statutes dealing with the regulation of hunting and fishing have been held to be "laws of general application" within the province: see **Kruger and Manuel, R. v. Dick** (1985, S.C.C.). Accordingly, even if they have the effect of "regulating Indians in a way which touches their Indianness," s. 88 of the **Indian Act** provides for their application to aboriginal peoples unless excluded by the rules of paramountcy in that section.

These general principles apply both on and off Indian reserves: see **Cardinal v. A.G. Alta.** (1973), S.C.C.); **R. v. Francis** (1981, S.C.C.). Of course, the results in a particular situation may be different depending whether the alleged offence took place on or off a reserve, since the **Indian Act** and other federal laws and treaties (made applicable either by general paramountcy principles or by s. 88) may treat reserves differently.

The principles governing the interpretation of treaties have been discussed in numerous cases. In **R. v. Sioui** (1990, S.C.C.) the court set out some of these principles (at C.C.C. p. 232-233):

- (i) courts must show flexibility in determining the legal nature of documents recording transactions with aboriginal peoples taking into account the historical context and the perception each side has of the nature of the transaction;
- (ii) treaties and statements must be liberally construed and uncertainties resolved in favour of aboriginal peoples;
- (iii) the same liberal approach should be taken to the preliminary question of capacity;
- (iv) once a valid treaty has been found to exist, that treaty must be given a just, broad and liberal construction.

The court affirmed the approach set out in **Jones v. Meehan** (1899, U.S.S.Ct.). For an example of these principles in operation, see **R. v. Ireland**, (1990, Ont. Gen. Div.).

Because of recent developments in the law in this area, earlier cases must be approached with caution. An extremely useful general source is J. Woodward **Native Law** (Carswell, 1989, looseleaf).

- Dick v. R. [1985] 2 S.C.R. 309, 22 C.C.C. (3d) 129
- R. v. Francis, [1988] 1 S.C.R. 1025, 41 C.C.C. (3d) 217
- R. v. Kruger and Manuel [1978], 1 S.C.R. 104, 34 C.C.C. (2d)
- Frank v. R., [1978] 1 S.C.R. 95, 34 C.C.C. 2d 209
- Cardinal v. A.G. Alta, [1974] S.C.R. 695, 13 C.C.C. (2d) 1
- R. v. Sioui [1990] 1 S.C.R. 1025, 56 C.C.C. (3d) 225
- Jones v. Meehan (1899), 175 U.S. 1 (U.S. S. Ct.)
- R. v. Ireland (1990), 1 O.R. (3d) 577 (Gen. Div.)

#### **Definition of "Game": s. 1**

A decoy intended to give the appearance of an animal is not "game" within the meaning of the Act (but see the annotation to the definition of "hunting", below).

- Caldwell v. R. (1990), 95 N.S.R. (2d) 272 (N.S.C.A.)

#### **Definition of "Game Bird": s. 1**

The definition of "game bird" in this section does not include raptors (birds of prey) imported into Ontario or birds bred from such raptors.

- African Lion Safari v. Ontario (1987), 59 O.R. (2d) 65, 1 C.E.L.R. (N.S.) 196 (Ont. C.A.)



**Definition of "Hunting": s. 1**

The holding in **R. v. Oberlander** (1910, B.C.S.C.) that "the word "hunt" in its natural sense means to pursue, to shoot at, or at least to do something more than look for" does not apply to the Ontario legislation. The definition of "hunting" is extremely broad and clearly prohibits looking for game for future kill.

*R. v. Oberlander* (1910), 15 B.C.R. 1314, 16 C.C.C. 244 (B.C.S.C.)

It would seem that searching for a particular bird or animal that has already been killed is not "hunting" within the meaning of the statute.

*R. v. Huskins* (1960), 32 C.R. 276 (N.S. Mag. Ct.)

However, pursuing a wounded animal is "hunting" within the meaning of the statute.

*R. v. Julian* (1978), 26 N.S.R. (2d) 156 (N.S.C.A.)

In **R. v. Calder** (1988, N.S. Co. Ct.) it was held that two individuals driving a motor vehicle slowly down a dirt road through a wooded area inhabited by game, looking from side to side, and pointing, were "hunting" within the meaning of the **Wildlife Act**, S.N.S. 1987, c. 13, which employs a very similar definition to the Ontario **G.F.A.**

*R. v. Calder* (1988), 86 N.S.R. (2d) 91 (N.S. Co. Ct.)

While a decoy is not "game" within the meaning of the **Wildlife Act**, S.N.S. 1987, c. 13, the definition of "hunting" (which is similar to the definition in the Ontario **G.F.A.**) is broad enough to cover the act of shooting at a decoy: see **R. v. Caldwell** (1990, N.S.C.A.). It is submitted that this is correct, given the extended definition of hunting. Every offence needs an *actus reus*. A person shooting at a decoy does not in fact shoot at an animal even if he intends to do so. However, the act of shooting at a decoy may permit an inference that the defendant is engaged in a course of conduct that fits within the extended definition of hunting.

*R. v. Caldwell* (1990), 95 N.S.R. (2d) 272 (N.S.C.A.)

It is not clear whether searching for game where there is no intention subsequently to capture, kill, or injure constitutes "hunting" under the Ontario **G.F.A.** This issue has been considered in a series of New Brunswick cases dealing with hunting with lights. In **R. ex rel. Lockhart v. Roberts** (1957, N.B. Co. Ct.) it was held that such conduct would indeed be hunting. However, in **R. ex rel. Lockhart v. Prosser** (1960, N.B.C.A.) it was held that hunting required an intention to kill, capture, or injure, so that, for example, a wildlife photographer would not "hunt" within the meaning of the definition. The issue has subsequently been resolved by statute in New Brunswick, and it is clear that in that province no intention to capture, kill or injure is necessary: see **R. v. Collicott** (1987, N.B.Q.B.).

R. ex rel. Lockhart v. Roberts (1957), 119 C.C.C. 362 (N.B. Mag. Ct.)

R. ex rel. Lockhart v. Prosser (1960), 129 C.C.C. 67 (N.B.C.A.)

R. v. Collicott (1987), 80 N.B.R. (2d) 369 (N.B.Q.B.)

Note the existence of the presumption in s. 90(b). The constitutionality of this provision has not been raised in any reported case.

### **Definition of "Non-Resident": s. 1**

A person who occupies a property in Ontario that he lives in at least three days each week, but who also resides and is employed in Michigan, is a non-resident within the meaning of this definition.

R. v. Nicholas (1970), 3 C.C.C. (2d) 46 (Ont. H.C.)

### **Definition of "Resident": s. 1**

The reference to a "period" of seven months requires that the calendar months (as defined in the **Interpretation Act**) be consecutive.

R. v. Richard Edwardson (1982), 8 W.C.B. 64 (Ont. C.A.)

### **Obstructing Officers: s. 13**

The constitutionality of this section was considered in **R. v. Robar** (1980, N.S.C.A.), where it was held that the existence of s. 118 [now s. 129] of the **Criminal Code** (obstruct peace officer) did not render the provincial legislation beyond the legislative competence of the province and thus *ultra vires*. A subsequent appeal to the Supreme Court of Canada was dismissed. The same result would probably be reached today on the basis of **Multiple Access v. McCutcheon** (1982, S.C.C.), since while there may be overlap there is no conflict between the two provisions.

R. v. Robar (1980), 56 C.C.C. (2d) 65 (N.S.C.A.), aff'd (1982), 68 C.C.C. (2d) 448 (S.C.C.)

Multiple Access v. McCutcheon, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1 (S.C.C.)

The corresponding section of the **Wildlife Act, 1979** (Sask.) has been held to create a full *mens rea* offence: see **R. v. Dahmer** (1982, Sask. Q.B.). It is submitted that the court erred in that case in importing the requirement of "wilfulness" from s. 118 [now s. 129] of the **Criminal Code** into the provincial offence, and that the offence should correctly be classified as one of strict liability.

R. v. Dahmer, [1983] 2 W.W.R. 407 (Sask. Q.B.)

### Authority to Stop Vehicles: s. 14

It is doubtful whether this section creates an offence of failing to stop at the direction of a conservation officer; rather, it simply gives a conservation officer the authority to stop vehicles. The failure to stop when directed, however, would be an offence under s. 13.

### Careless Hunting: s. 19

In considering the equivalent Nova Scotia provision, O'Hearn Co. Ct. J. in **R. v. Howard** (1966, N.S. Co. Ct.) drew an analogy between careless hunting and careless driving. He held that the offence required only a failure to exercise reasonable care, and could be committed by mere inadvertence without any need for recklessness, wantonness, wilfulness or an intention to cause harm or to scare. Extending the analogy to careless driving, it is not clear whether this would be sufficient in Ontario or whether the Crown would have also to demonstrate that the second limb of the test in **Beauchamp** (1953, Ont. C.A.), was met. This requires "that the conduct must be of such a nature that it can be considered a breach of duty to the public and deserving of punishment" (see the annotation to s. 130 of the **Highway Traffic Act** for further discussion of this test). It might be argued that even if this further element were required, the use of a firearm is qualitatively different from the use of a car and any failure to exercise reasonable care with a firearm automatically meet this test.

R. v. Howard (1966), 9 Crim. L.Q. 105 (N.S. Co. Ct.)

R. v. Beauchamp (1953), 16 C.R. 270 (Ont. C.A.)

The constitutionality of the offence of careless hunting was considered in **Chiasson** (1982, N.B.C.A.). The court held that the section was *intra vires* the provincial legislature as a local or private matter under s. 92(16) of the **Constitution Act, 1867**, or a matter of property and civil rights under s. 92(13) of the **Constitution Act, 1867**, because it is directed at safeguarding persons and property from the activities of those engaged in hunting. The court also held that the section was not rendered inoperative by virtue of s. 86(2) of the **Criminal Code** (which makes it an offence to handle a firearm in a careless manner). Although there is no significant difference between the acts prohibited by the two sections, there is no operational conflict in the sense that compliance with one law involves breach of the other. The two provisions can therefore operate concurrently.

R. v. Chiasson (1982), 27 C.R. (3d) 361, 66 C.C.C. (2d) 195 (N.B.C.A.); affirmed (1984), 11 C.C.C. (3d) 385 (S.C.C.)

### **Hunting from Aircraft: s. 20(1)**

The constitutionality of the Saskatchewan legislation which prohibits using aircraft to hunt game was upheld in **R. v. Pearsall** (1977, Sask. C.A.). The true intent and purpose of the legislation was to protect game and to regulate hunting, matters within the jurisdiction of the Legislature. There was no encroachment on Parliament's exclusive jurisdiction over aeronautics.

R. v. Pearsall (1977), 37 C.C.C. (2d) 414, [1978] 5 W.W.R. 298 (Sask. C.A.)

The court in **R. v. Hanaway and Lamaga** (1980, Ont. Dist. Ct.) expressed the view, in *obiter*, that this offence was one of strict liability.

R. v. Hanaway and Lamaga (1980), 63 C.C.C. (2d) 44 (Ont. Dist. Ct.), leave to appeal to Div. Ct. refused *ibid* at 55

The definition of hunting in s. 1 includes "searching for". In **R. v. Hanaway and Lamaga** (1980, Ont. Dist. Ct.) the defendants used an aircraft to spot moose from the air and then landed at the closest accessible spot to permit hunters to go after the moose. The "hunters" were undercover conservation officers. It was held that the acts of the defendants fell squarely within the expanded definition of hunting.

In **R. v. Yablonski** (1973, B.C. Prov. Ct.) the defendant was pilot of a plane containing a guide and a hunter. The defendant spotted a moose and, without encouragement from the guide or hunter, brought his plane down in order that the guide and hunter could shoot it. It was held that these acts would constitute a "chase", "pursuing" or "following after" within the meaning of the expanded definition of hunting (which is similar in effect to the Ontario definition).



**Firearms in Game Areas: s. 21**

Note that the expanded definition of hunting found in s. 1 applies to this section.

The corresponding offence in the New Brunswick **Fish and Wildlife Act** has been classified as an offence of strict liability.

R. v. Peterson (1987), 80 N.B.R. (2d) 324 (N.B.Q.B.)

**Prohibition as to Guns: s. 22(1)**

**R. v. Morrison and MacKay** (1979, N.S.C.A.) and **R. v. Croft** (1979, N.S.C.A.) have held that the corresponding offence in the Nova Scotia **Lands and Forests Act**, R.S.N.S. 1967, c. 163, s. 123(2), is an offence of absolute liability. Neither case considers **R. v. Chapin** (1979, S.C.C.) and, in view of the reasons in that case and the stiff penalties provided in s. 91 of the Ontario **G.F.A.**, it is submitted that the section is properly classified as being an offence of strict liability.

R. v. Morrison and MacKay (1979), 31 N.S.R. (2d) 195 (N.S.C.A.)

R. v. Croft (1979), 35 N.S.R. (2d) 344 (N.S.C.A.)

R. v. Chapin (1979), 45 C.C.C. (2d) 333, 7 C.R. 30 225 (S.C.C.)

**Night Hunting: s. 22(2)**

Note the expanded definition of "hunting" in s. 1. That definition refers to prey that will "be *then or subsequently* captured, injured or killed..." Presumably the holding in **R. v. Huskins** (1960, N.S. Mag. Ct.) that searching at night for prey that was killed during the day is not "hunting" would apply to s. 22(2), since the animal has previously been killed.

R. v. Huskins (1960), 32 C.R. 276 (N.S. Mag. Ct.)

The Nova Scotia County Court in **R. v. MacArthur** (1987, N.S. Co. Ct.) held that convictions for both night hunting and hunting with the assistance of a light arising out of the same incident were barred by the rule against multiple convictions. It is not clear whether this conclusion, even if correct at the time it was rendered, would still be valid in light of the reformulation of the principles of **Kienapple** in **R. v. Prince** (1986, S.C.C.)

R. v. MacArthur (1987), 76 N.S.R. (2d) 346 (N.S. Co. Ct.)

R. v. Kienapple, [1975] 1 S.C.R. 739, 15 C.C.C. (2d) 524

R. v. Prince (1986), 30 C.C.C. (3d) 35, 54 C.R. (3d) 97 (S.C.C.)

See further "The Rule Against Multiple Convictions" in **General Principles and Defences**, above



**Hunting, Use of Lights: s. 22(3)**

The headlights of a motor vehicle are capable of being lights within the meaning of this section.

R. v. Jorden, [1966] 2 C.C.C. 243 (N.B.C.A.)

R. v. Wamboldt and Wamboldt (1982), 58 N.S.R. (2d) 60 (N.S.C.A.)

The legislation in some other provinces provides a reverse onus whereby persons found at night with a firearm and a light capable of, or being used for, attracting wildlife bear the burden of proving that they were not committing the offence. The Ontario statute contains no such presumption (although note the evidentiary presumption with respect to "hunting" contained in s. 90(b)).

The section requires proof of (i) hunting and (ii) use of a device capable of throwing or casting rays of light on any object. It is not necessary that the defendant hunt directly by means of, or with the assistance of, the light. Apparently, he need only use the light for any purpose while hunting. For example, the use of a light to read a map while hunting would appear to fall within the section.

**Automatic Shotguns: s. 25**

This offence has been held to create an offence of strict liability. In **R. v. Cougle** (1981, N.B.Q.B.) the defendant was held to have a good defence where a plug had been removed by a gunsmith (not the defendant) during repair. The gunsmith had inadvertently forgotten to replace it, and the defendant had never placed more than the permitted number of shells in the weapon.

R. v. Cougle (1981), 34 N.B.R. (2d) 334 (N.B.Q.B.)

Note that the section permits a total of three shells in the magazine and chamber combined.

**Hunting in Provincial Parks: s. 26(1)**

Treaty Indians are bound by the provisions of the **Game Act**, R.S.S. 1965, c. 356 prohibiting hunting on lands designated as game preserves.

R. v. Nippi (1969), 70 W.W.R. 390 (Sask. Dist. Ct.)

**Weapons in Provincial Parks: s. 26(2)**

The court considering the analogous Nova Scotia section held that it created an offence of strict liability permitting a defence of honest and reasonable mistake of fact. An honest mistake by the defendant that he was outside the park was not sufficient by itself for a defence, and the mistake was not reasonable since the boundary was clearly signed.

R. v. Lace (1981), 45 N.S.R. (2d) 466 (N.S. Prov. Ct.)

**Licences: s. 36**

Hunting without a licence contrary to s. 152(1) of the **Lands and Forests Act**, R.S.N.S. 1967, c. 163 was held in **R. v. Paul and Copage** (1977, N.S.C.A.), to be an offence of strict liability.

R. v. Paul and Copage (1977), 24 N.S.R. (2d) 313 (N.S.C.A.)

Note that the section refers to "the authority of a licence". This would seem to require that the licence be valid and effective.

**Open Seasons: s. 47**

The offence created by this section is one of strict liability, so that an honest and reasonable mistake of fact will be a defence.

R. v. Weesk (1985), 15 W.C.B. 186 (Ont. Dist. Ct.)

**Traps, Nets, Snares, etc. Prohibited: s. 48**

The corresponding Alberta legislation was held in **R. v. Brown and Ballman** (1982, Alta. C.A.) to create a full *mens rea* offence. There are significant differences in wording between the Alberta and Ontario statutes, so that holding would not seem to foreclose an argument that the Ontario offence is one of strict liability.

R. v. Brown and Ballman (1982), 69 C.C.C. (2d) 301 (Alta. C.A.), leave to appeal to S.C.C. refused 46 N.R. 85

**Interference with Traps: s. 63**

The corresponding offence in s. 28(1) of the **Yukon Game Ordinance** has been held to be one of strict liability. In **R. v. Gonder**, (1981, Y.T.C.), The defendant was the operator of a construction train who had obtained a land use permit from the Government. Having notified all the trappers of his intention to do so, he proceeded to take his train on a wilderness road and in so doing damaged some of those traps which had not been removed. The court considered the circumstances to determine

the degree of care having regard to the gravity of potential harm from the defendant's conduct, the alternatives available to him, the likelihood of harm, the degree of knowledge or skill expected of the defendant, and the extent to which underlying causes of the offence were beyond the control of the defendant. It was held that the defendant had exercised reasonable care by notifying trappers beforehand and attempting to minimize any damage once he realized all the traps had not been removed. He was acquitted.

R. v. Gonder (1981), 62 C.C.C. (2d) 326 (Yukon Territorial Ct.)

### **No Traffic in Certain Fish: s. 72**

Since the offence of "being concerned in the sale of fish" can be committed without the defendant necessarily having possessed, taken, killed or procured fish, a prosecution under this section is not a prosecution "in respect of" taking, killing, possessing or procuring fish. Accordingly, the presumption under s. 90(a) is not available to the Crown.

R. v. Penasse and McLeod (1971), 8 C.C.C. (2d) 569 (Ont. Prov. Ct.)

### **Dogs Running at Large: s. 80(1)**

This section provides civil immunity to an officer who shoots on sight "a dog running deer, elk, moose or bear during the closed season..." in a "locality that deer, elk, moose or bear *usually* inhabit or in which they or any of them are *usually* found".

In **Yarrow v. Buie**, (Ont. Co. Ct) it was held that no such immunity attached to an officer who shot a dog that was running loose in an area which, although not frequented by deer, was at the time in question populated by at least one deer (there was evidence of tracks and droppings). The court held that it was not enough that deer were found in the locality; it must be proved that they were usually found there.

Yarrow v. Buie, [1950] O.W.N. 553 (Ont. Co. Ct.)

### **Transport of Fish or Game Illegally Taken: s. 83(2)**

The predecessor to this section, section 68(1)(c) of the **Game and Fisheries Act**, R.S.O. 1950, c. 153 was held to proscribe a *mens rea* offence in **R. v. Laverge** (1951, Ont. Dist. Ct.) In that case a taxi driver was engaged by certain persons to transport them. These persons placed parcels of moose meat in the trunk of the taxi. The driver had no knowledge of the contents of those packages. He was acquitted on appeal. The legislation, although different in wording, is similar in content to the current provisions. It is doubtful whether this classification of the offence remains valid in light of **R. v. City of Sault Ste. Marie**.

R. v. Laverge, [1951] O.W.N. 617, 100 C.C.C. 265 (Ont. Dist. Ct.)

R. v. City of Sault Ste. Marie, (1978), 3 C.R. (3d) 30, 40 C.C.C. (2d) 353 (S.C.C.)

### **Contravention of Act or Regulations: s. 85**

The offence of failing to tag a deer under the **Lands and Forests Act**, R.S.N.S. 1967, c. 163, and regulations thereunder, is an offence of absolute liability.

R. v. Maidment (1984), 10 C.C.C. (3d) 512, 37 C.R. (3d) 381 (N.S.C.A.)

The tag must be affixed by the person who kills the animal.

R. v. Psovsky, [1988] 4 W.W.R. 471 (Sask. Q.B.)

The word "attached" in the Regulation governing tagging is to be interpreted strictly. Accordingly, the offence was not made out where the defendants had attached a seal, even though the method used would permit the re-use of seals only intended to be used once.

R. v. Dagelman (1982), 8 W.C.B. 408 (Ont. Dist. Ct.)

## HIGHWAY TRAFFIC ACT

R.S.O. 1990, c. H. 8

## TABLE OF CONTENTS

Definition of "Crosswalk": s. 1(1) .....	A5-1
✓ Definition of "Driver": s. 1(1) .....	A5-1
✓ Definition of "Highway": s. 1(1) .....	A5-3
✓ Definition of "Motor Vehicle": s. 1(1) .....	A5-4
Definition of "Road Building Machine": s. 1(1) .....	A5-5
Definition of "Trailer": s. 1(1) .....	A5-5
✓ Definition of "Vehicle": s. 1(1) .....	A5-5
✓ Permit and Number Plates Required: s. 7(1) .....	A5-5
✓ Transfer of Ownership: s. 11(1) .....	A5-5
✓ Exceptions as to Residents of Other Provinces: s. 15 .....	A5-6
✓ Driver Motor Vehicle--No Licence/Improper Licence: s. 32 .....	A5-6
✓ Driver--Fail to Surrender Licence: s. 33 .....	A5-6
Suspension on Conviction for Certain Offences: s. 41 .....	A5-7
Constitutional Validity .....	A5-7
Subsequent Convictions .....	A5-9
Extraprovincial Licences .....	A5-10
Order Extending Suspension .....	A5-11
Appeals .....	A5-11
Charter Issues .....	A5-12
Suspension for Default in Payment of Fine: s. 46 .....	A5-12
Spot Checks: s. 48(1) .....	A5-13
Common Law .....	A5-13
Effect of Section .....	A5-13
Constitutional Validity .....	A5-14
Licence Suspension for Twelve Hours: s. 48(2)-(13) .....	A5-15
Introduction .....	A5-15
Constitutional Validity .....	A5-15
Operation of the Provisions .....	A5-16
Charter Issues .....	A5-16
Multiple Convictions .....	A5-18
Records .....	A5-18
Appeal Procedures: s. 50 .....	A5-18



Service: s. 54 .....	A5-19
Operation .....	A5-19
Charter Issues .....	A5-20
✓ Driving While Driver's Licence Suspended: s. 53 .....	A5-21
Nature of Offence .....	A5-21
Form of Information .....	A5-22
Applicability on Indian Reservations .....	A5-23
Effect of Valid Out-of-Province Licence .....	A5-23
Effect of Payment of Fines on Suspension .....	A5-23
Validity of Out of Province Suspension .....	A5-24
Defences:	
Officially Induced Error .....	A5-24
Due Diligence and Reasonable Mistake of Fact .....	A5-26
Multiple Convictions .....	A5-28
Charter Issues .....	A5-29
Where Person Suspended Does Not Hold Licence: s. 54 .....	A5-30
Demerit Point System: s. 56 .....	A5-30
Requirements as to Tires: ss. 69, 70 .....	A5-31
Signs, Etc., Obstructing View: s. 73 .....	A5-31
Unnecessary Noise: s.75(4) .....	A5-32
Radar Warning Device Prohibited: s. 79 .....	A5-32
General .....	A5-32
Constitutional Issues .....	A5-33
Attachments Required when Vehicle Drawn on Highway: s. 80 .....	A5-34
Safety Standards Certificates: s.90 .....	A5-34
Motorcyclists to Wear Helmet: s.104 .....	A5-34
✓ Seatbelt Assembly: s. 106 .....	A5-35
General .....	A5-35
Charter .....	A5-36
Width of Vehicle: s. 109 .....	A5-37
Load and Dimension Permits: s. 110 .....	A5-37
Loading of Motor Vehicle Etc.: s. 111(2) .....	A5-38
Weight: s. 114 .....	A5-38
Restrictions as to Weight on Tires: s. 115 .....	A5-39
Maximum Allowable Axle Unit Weights: s. 116 .....	A5-39
Maximum Allowable Gross Vehicle Weights: s. 118 .....	A5-40
Power of Officer to Have Load Weighed: s. 124 .....	A5-40
Penalty: s. 125 .....	A5-40

✓ Rate of Speed: s. 128 .....	A5-40
Classification of Offence .....	A5-40
Proof of Speed Limit .....	A5-41
Description of Speed .....	A5-43
Radar Speed Measuring Device .....	A5-43
Radar:	
Judicial Notice of Operations .....	A5-43
Qualifications of Operator .....	A5-43
Testing of Radar Device .....	A5-45
Certificate of Accuracy of Tuning Forks .....	A5-46
Unit Capable of Accurately Measuring Speeds .....	A5-47
Checklist .....	A5-49
Pacing .....	A5-49
✓ Common Law Defences .....	A5-50
✓ Careless Driving: s.130 .....	A5-51
Advertence/Inadvertence and Classification .....	A5-51
The Test or Standard of Conduct .....	A5-53
One Offence or Two .....	A5-54
Included Offences .....	A5-55
Conduct as a Whole .....	A5-55
Ability of Driver .....	A5-56
Rate of Speed .....	A5-56
Unforeseeable Obstacle .....	A5-57
Condition of Vehicle and Driver .....	A5-57
Stopping Vehicle .....	A5-58
Momentary Inadvertence .....	A5-58
Error of Judgment .....	A5-58
Circumstantial Evidence .....	A5-59
Autrefois .....	A5-60
Multiple Convictions .....	A5-60
Direction of Traffic by Constable: s. 134 .....	A5-60
✓ Right of Way at Uncontrolled Intersection: s. 135 .....	A5-61
✓ Stop at Through Highway: s. 136 .....	A5-61
The Stop Sign .....	A5-61
Classification .....	A5-62
Duty to Stop .....	A5-62
Duty to Yield .....	A5-63
✓ Yield Right of Way Signs: s. 138 .....	A5-63

✓ Right of Way on Entering Highway from Private Road: s. 119	A5-64
✓ Pedestrian Crossovers: s. 140	A5-64
✓ Left Turn Across Path of Approaching Vehicle: s. 141(5)	A5-65
✓ Left Turn at Intersection: s. 141(6)	A5-65
Signal for Left or Right Turn: s. 142(1)	A5-65
U-turns Prohibited: s. 143	A5-66
Where to Stop--Intersection: s. 144(5)	A5-67
✓ Amber Light--Fail to Stop: s. 144(15)	A5-67
✓ Red Light--Fail to Stop: s. 144(18)	A5-67
Erection of Signal Lights: s. 144(31)	A5-68
Passing, Meeting Vehicles: s. 148	A5-68
"Roadway"	A5-68
Nature of Offence	A5-68
Pass on Right--Not in Safety: Pass--Off Roadway: s. 150	A5-69
Paved Shoulder Deemed Not Part of Roadway: s. 151(3)	A5-69
✓ Follow Too Closely: s. 158(1)	A5-69
Emergency Vehicle Approaching: s. 159	A5-70
Drive While Crowded: s. 162	A5-71
Stop at Railway Crossing Signal: s. 163	A5-71
Parking Infractions: s. 170	A5-72
Racing on Highway: s. 172	A5-72
✓ School Bus Stopped on Highway: s. 175	A5-74
✓ Disobey Sign: s. 182	A5-74
Duty to Report Accident: s. 199	A5-75
Duty	A5-76
"Forthwith"	A5-76
Assessment of Damage	A5-76
Effect of Criminal Charge	A5-76
Delegation	A5-77
✓ Fail to Remain: s. 200	A5-77
Nature and Classification	A5-77
Meaning of "Accident"	A5-78
Notification of Damage: s. 201	A5-79

Vehicle Owner May be Convicted: s. 207 .....	A5-79
General .....	A5-79
Scope of Section .....	A5-80
Meaning of "Owner" .....	A5-80
Burden of Proof .....	A5-80
Multiple Convictions .....	A5-80
Charter Issues .....	A5-80
Evidence: s. 210(7) .....	A5-81
Judge to Secure Possession: s. 211 .....	A5-81
Driver Improvement Program-Suspension of Fine: s. 215 .....	A5-81
Power of Police to Stop Vehicles: s. 216(1),(2) .....	A5-82
Introduction .....	A5-82
Constitutional Validity .....	A5-82
Nature of the Offence .....	A5-83
Form of Charge .....	A5-83
"Police Officer" .....	A5-84
"In the Lawful Execution of His Duties and Responsibilities" .....	A5-84
"Signalled or Requested" .....	A5-85
"Police Officer...Readily Identifiable As Such" .....	A5-86
"Shall Immediately Come to a Safe Stop" .....	A5-86
Escape by Flight: s. 216(3) .....	A5-86
Introduction .....	A5-86
Nature of the Offence .....	A5-87
Form of Charge .....	A5-87
Nature of Sentence Provision .....	A5-88
Multiple Convictions .....	A5-88





**HIGHWAY TRAFFIC ACT**

R.S.O. 1990, c. H. 8

**Definition of "Crosswalk": s. 1(1)**

A "crosswalk" does not require a designation by regulation or by-law (compare the definition of "pedestrian crossover"). Yellow lines painted on the road are sufficient to designate a crosswalk.

R. v. Schoemaker (1979), 2 M.V.R. 27 (Ont. Co. Ct.)

**Definition of "Driver": s. 1(1)**

The **Highway Traffic Act** defines "driver" as "a person who drives a motor vehicle on a highway".

In an English case, **R. v. Roberts** (1965, C.C.A.) the court proposed the following definition of "driving" (at 88):

...a man cannot be said to be a driver unless he is in the driving seat or in control of the steering wheel and also has something to do with the propulsion.

In that case, however, there was no question that the defendant was responsible for the propulsion of the vehicle. The issue was whether control over direction was also necessary. Accordingly, it is not clear whether the court was requiring control over propulsion as an element of driving or simply referring to the fact that it was present. The court later in **R. v. MacDonagh** (1974, C.A.) proposed a slightly different test (at 258):

...[driving] refers to a person using the driver's controls for the purpose of directing the movement of the vehicle. It matters not that the vehicle is not moving under its own power, or is being driven by the force of gravity, or even that it is being pushed by other well-wishers. The essence of driving is the use of the driver's controls in order to direct the movement, however that movement is produced.

This test probably reflects the law in Canada: see **Belanger v. R.** (1970, S.C.C.) where Ritchie J. for the majority of the court held that a person who consciously assumes physical control of the direction of a vehicle drives it within the meaning of the dangerous driving provisions of the **Criminal Code**.

R. v. Roberts, [1965] 1 Q.B. 85 (C.C.A.)

R. v. MacDonagh, [1974] 2 All E.R. 257 (C.A.)

Belanger v. R., [1970] S.C.R. 567, [1970] 2 C.C.C. 213 (S.C.C.)

While **Wallace v. Major** (1946, C.A.), another English case, held that a person who was steering a disabled motor vehicle being towed by another vehicle was not "driving" the vehicle, this conclusion was strongly doubted in **R. v. MacDonagh** (1974, C.A.). Several Canadian cases have held that the person steering a towed vehicle is "driving" that vehicle for the purposes of a Criminal Code driving offence: see **R. v. Miller** (1944, Ont. Co. Ct.), **R. v. Morton** (1970, B.C. Prov. Ct.), **R. v. Josephy** (1978, B.C. Prov. Ct.).

Wallace v. Major, [1946] 1 K.B. 473 (C.A.)

R. v. MacDonagh, [1974] 2 All E.R. 257 (C.A.)

R. v. Miller (1944), 82 C.C.C. 314, [1944] O.W.N. 617 (Ont. Co. Ct.)

R. v. Morton (1970), 12 C.R.N.S. 76 (B.C. Prov. Ct.)

R. v. Josephy, [1978] 2 W.W.R. 583 (B.C. Prov. Ct.)

A passenger who grabs the wheel of a moving car from the person sitting in the driver's seat with intent to assume control over the direction of the vehicle, even if only briefly, "drives" the vehicle for that time.

Belanger v. R., [1970] S.C.R. 567, [1970] 2 C.C.C. 206 (S.C.C.)

A person who steers a vehicle while it is being pushed by other people drives the vehicle.

Shimmel v. Fisher, [1951] 2 All E.R. 672 (Div. Ct.)

However, a person who pushes a vehicle by himself while standing outside the vehicle with his hand on the wheel is not "driving" the vehicle, since on the ordinary meaning of words there is a distinction between "driving" a vehicle and "pushing" it.

R. v. MacDonagh, [1974] 2 All E.R. 257 (C.A.)

A person who takes control and steers a coasting vehicle drives that vehicle, whether or not he set the vehicle in motion by some action of his own: see **Saycell v. Bool** (1948, Div. Ct.) and **R. v. Kitson** (1955, C.A.). However, it was held in **R. v. Roberts** (1965, C.A.) that a person who sets a vehicle parked on an incline in motion by releasing the brake, but then immediately jumps clear, does not drive the vehicle, presumably because he never took control of its direction.

Saycell v. Bool, [1948] 2 All E.R. 83 (Div. Ct.)

R. v. Kitson (1955), 39 Cr.App.R. 66 (C.C.A.)

R. v. Roberts, [1965] 1 Q.B. 85 (C.A.)

**Definition of "Highway": s. 1(1)**

It was held in **R. v. Wall** (1968, Ont. Mag. Ct.) that a sidewalk was not within the definition of "highway" and a charge of careless driving could not be based on the act of driving on the sidewalk. The definition of highway, however, has subsequently been amended. It now seems that a sidewalk would fall within the new definition.

*R. v. Wall* (1968), 11 Crim. L.Q. 223 (Ont. Mag. Ct.)

A series of cases have considered whether or not a privately-owned parking lot (for instance, one adjacent to a shopping mall or apartment building) is a "highway". A parking lot was held to be a highway in **Annan v. Myers** (1968, Ont. Co. Ct.), but the opposite result was reached in **Gill v. Elwood** (1969, Ont. Co. Ct.), where the court in careful reasons limited the definition to those areas that were not privately owned and that the public had a right (as opposed to a licence) to use. **Gill v. Elwood** was upheld on appeal and was followed in **Brinton v. Sieniewicz** (1969, N.S.S.C.T.D.). The issue came before the Supreme Court of Canada in **R. v. Mansour** (1979, S.C.C.), where the court held that neither in its ordinary and popular meaning nor in its statutory definition did the word "highway" include such a parking lot. The definition of "highway" has subsequently been amended; however, it is submitted in light of the retention in the definition of the words "common and public" that the reasoning in **Gill v. Elwood** is still persuasive and that a privately owned parking lot is still not a "highway" within the meaning of the **H.T.A.**

*Annan v. Myers*, [1968] 1 O.R. 328 (Co. Ct.)

*Gill v. Elwood*, [1969] 2 O.R. 49 (Co. Ct.), *aff'd* [1970] 2 O.R. 59 (C.A.)

*Brinton v. Sieniewicz* (1969), 1 D.L.R. (3d) 545 (N.S.S.C.T.D.)

*R. v. Mansour*, [1979] 2 S.C.R. 916, 47 C.C.C. (2d) 129 (S.C.C.)

However, in **Sked v. Henry** (1991, Ont. Gen. Div.) it was held that a public collegiate parking lot that is used in part by the general public for the passage and parking of vehicles is a "highway" within the meaning of the section. The court specifically adverted to **Gill v. Elwood** but distinguished it.

*Sked v. Henry* (1991), 28 M.V.R. (2d) 234 (Ont. Gen. Div.)

A road built and maintained by Ontario Hydro has been held to be a highway notwithstanding that permission had to be obtained to use it and a pass issued to successful applicants: no applicant had been refused permission.

*Rosentreter v. Fuerst*, [1957] O.W.N. 458, 10 D.L.R. (2d) 521 (Ont. H.C.)

A ferry is not a highway within this section.

Van Every v. Van Every (1983), 20 A.C.W.S. (2d) 199 (Ont. H.C.)

The cases conflict regarding roads on Indian reserves: see **R. v. Spear Chief** (1963, Alta. Dist. Ct.) and **R. v. Sport** (1971, B.C. Co. Ct.) and compare **R. v. Johns (No. 2)** (1963, Sask. Dist. Ct.) and **R. v. Canute** (1983, B.C. Co. Ct.). In **Bressette v. Wolfe** (1984, Ont. Co. Ct.) it was held that a road on a reservation used by the public and maintained by public money was a highway for the purposes of s. 192(1) of the H.T.A.

R. v. Spear Chief (1963), 45 W.W.R. 161 (Alta. Dist. Ct.)

R. v. Sport (1971), 3 C.C.C. (2d) 477 (B.C. Co. Ct.)

R. v. Johns (No. 2) (1963), 45 W.W.R. 65 (Sask. Dist. Ct.)

R. v. Canute, [1983] 5 W.W.R. 566 (B.C. Co. Ct.)

Bressette v. Wolfe (1984), 48 O.R. (2d) 114 (Co. Ct.)

A street that would otherwise be a highway but is temporarily blocked off by police in order to prevent traffic from travelling on it is not a "highway" within the meaning of the section.

Cirillo v. R. (1981), 11 M.V.R. 16 (Ont. Co. Ct.)

### **Definition of "Motor Vehicle": s. 1(1)**

Since a farm tractor is excluded from the definition, s. 53 (driving while under suspension) does not apply to the operator of a farm tractor.

R. v. McKenzie, [1961] O.W.N. 344 (Dist. Ct.)

An automobile that cannot be set in motion by its own power by virtue of the fact that it is stuck in a snowbank is still a motor vehicle within the meaning of s. 2 of the **Criminal Code**.

Saunders v. R., [1967] S.C.R. 284, [1967] 3 C.C.C. 278

It has been held under a similar provision of **The Vehicles Act, 1957** (Sask.) that a self-propelled combine is not a "motor vehicle".

R. v. Vaisvyla (1958), 29 C.R. 71 (Sask. Dist. Ct.)



**Definition of "Road-Building Machine": s. 1(1)**

It was held in **Bell Telephone Co. v. I.B. Purcell Ltd.** (1962,) that a power shovel was not a "road-building machine". The definition of "road-building machine" has since been replaced and it is submitted this case is no longer good law.

*Bell Telephone Co. v. I.B. Purcell Ltd.*, [1962] O.W.N. 184 (Co. Ct.)

Note that the definition is quite broad and includes numerous machines that are used for maintaining, as opposed to building roads.

**Definition of "Trailer": s. 1(1)**

An asphalt mixer mounted on wheels is not a "trailer" within the meaning of the definition.

*R. v. Vulcan Asphalt & Supply Co. Ltd.*, [1964] 1 C.C.C. 198, 42 C.R. 365 (Ont. C.A.)

**Definition of "Vehicle": s. 1(1)**

A wheelchair is a vehicle. It seems that a bicycle, propelled by muscular power, is also a vehicle.

*Carlson v. Chochinov*, [1947] 1 W.W.R. 755, [1947] 2 D.L.R. 64 (Man. K.B.), aff'd [1948] 4 D.L.R. 556 (Man. C.A.)

*Harper v. Assoc. Newspapers Ltd.* (1927), 43 T.L.R. 331.

**Permit and Number Plates Required: s. 7(1)**

In **R. v. Blackburn** (1980, B.C.C.A.) the corresponding provision of the **Motor Vehicle Act (B.C.)** governing number plates was held to create a strict, rather than absolute, liability offence.

*R. v. Blackburn* (1980), 57 C.C.C. (2d) 7, 9 M.V.R. 146 (B.C.C.A.)

Section 7(1) of the **H.T.A.** now applies to the driver of a motor vehicle rather than the owner.

**Transfer of Ownership: s. 11(1)**

A person may only transfer a number plate under s. 11(3) where he no longer owns or leases the vehicle that the plate was transferred from. It would appear that where a person seeks to use the provisions of s. 11(3) and s. 11(4) as a defence to a charge under s. 7 or s. 12, the evidential (and perhaps persuasive) onus lies on him.

*R. v. Queensway Motors Ltd.* (1986), 47 M.V.R. 144 (Ont. Prov. Ct.)



**Exceptions as to Residents of Other Provinces: s. 15**

This section raises the issue of the applicability of the exception. It has been held under the corresponding New Brunswick legislation that, once the Crown has established the *prima facie* elements of an offence, it is up to the defendant to bring himself within the exception.

R. v. Macaulay (1958), 120 C.C.C. 372 (N.B. Co. Ct.)

**Drive Motor Vehicle--No Licence/Improper Licence: s. 32**

A subsection of the corresponding Alberta legislation places an onus on the defendant "to show that he holds a subsisting operator's licence". Section 32(1) of the Ontario **H.T.A.** does not directly impose such a burden but states that "no person shall drive a motor vehicle on a highway *unless*...[licensed to do so]". By virtue of s. 47(3) of the **Provincial Offences Act** the burden of proving this authorization or qualification falls on the defendant. The burden is proof on the balance of probabilities. In **R. v. Clements** (1983, Alta. Prov. Ct.) the Alberta provision was held not to contravene s. 11(d) of the **Charter**.

R. v. Clements (1983), 21 M.V.R. 74 (Alta. Prov. Ct.)

In **R. v. Fuchs** (1972, B.C.S.C.) it was held that a person does not cease to be the holder of a driver's licence merely because the licence is not signed in ink. The signing requirement for in Ontario is found in R.R.O. 1990, Reg. 585, s. 25. The wording of this section is extremely unusual. In view of **R. v. Elm Tree Nursing Home Inc.** (1987, Ont. C.A.) it is doubtful whether failure to sign one's licence is an offence under that section, and likewise doubtful that driving a motor vehicle with an unsigned licence is an offence under s. 32.

R. v. Fuchs (1972), 7 C.C.C. (2d) 366 (B.C.S.C.)

R. v. Elm Tree Nursing Home Inc. (1987), 20 O.A.C. 277 (C.A.)

Whether a conviction under this section bars a subsequent conviction for driving while suspended arising out of the same incident is discussed in "Driving While Suspended: s. 53", below.

**Driver--Fail to Surrender Licence: s. 33**

In **R. v. Comeau** (1960, N.B.C.A.) it was held that the corresponding offence in New Brunswick could only be committed by a person who had a valid and outstanding licence at the time of the offence, and accordingly could not be committed by a person whose licence was under suspension.

R. v. Comeau (1960), 129 C.C.C. 326 (N.B.C.A.)

The section is not limited to the drivers of motor vehicles travelling on a highway, and applies generally to persons in charge of a motor vehicle: see **R. v. Williams** (1958, Ont. Mag. Ct.). It would appear from **R. v. Hisey** (1985, Ont. C.A.) that the section when interpreted this way is not beyond the legislative competence of the province under s. 92 of the **Constitution Act, 1867**.

*R. v. Williams* (1958), 120 C.C.C. 34 (Ont. Mag. Ct.)

*R. v. Hisey* (1985), 24 C.C.C. (3d) 20, 40 M.V.R. 152 (Ont. C.A.), leave to appeal to S.C.C. refused (1986), 67 N.R. 160; discussed in "Fail to Stop for Police: s. 216", below

In **R. v. Dedman** (1985, S.C.C.) the court held unanimously that s. 33(1) of the **H.T.A.** does not give police the statutory authority to stop motor vehicles in order to demand the surrender of a driver's licence for inspection; however, the court also held (4:3) that a police officer does have such authority at common law. The facts of the case arose prior to the enactment of s. 216(1), and that section now provides statutory authority for such stops.

*R. v. Dedman* (1985), 20 C.C.C. (3d) 97, 34 M.V.R. 1 (S.C.C.)

A demand to produce a licence under this section does not constitute an unreasonable search and seizure under s. 8 of the **Charter**, since it does not encroach on a reasonable expectation of privacy.

*R. v. Hufsky*, [1988], 1 S.C.R. 621, 40 C.C.C. (3d) 398 (S.C.C.)

### **Suspension on Conviction for Certain Offences: s. 41**

Constitutional Validity: The nature of provincial legislation suspending a driver's licence upon conviction for a **Criminal Code** driving offence determines whether such provisions are *intra vires* the provincial legislature or are *ultra vires* as being legislation in respect of criminal law.

The Supreme Court of Canada has held that the automatic licence suspension provisions of the provinces of Prince Edward Island (**Egan**, 1941; **Bell**, 1973) and Ontario (**Ross**, 1973) were in pith and substance within the classes of subjects assigned to the provincial Legislatures (**Egan**, C.C.C. 244). Such provincial legislation does not impose an additional penalty for an offence already punished by the **Criminal Code**, but merely provides for a civil disability arising out of a conviction for a criminal offence (**Egan**, C.C.C. 245 and 248). These civil consequences of a criminal act are not to be considered as "punishment" so as to bring the matter within the exclusive jurisdiction of Parliament (**Ross**, C.R.N.S. 324-5). The **Egan** principle that such suspensions are not additional penalties imposed for a violation of criminal law but rather civil disabilities arising out of a conviction for a criminal offence was followed by the Ontario Court of Appeal in **R. v. Joslin** (1981), by the Ontario High Court of Justice in **Benn v. Registrar of Motor Vehicles et al.** (1981), by the Quebec Superior Court in **Lebel v. R. et al.** (1982) by the Saskatchewan and Manitoba Courts of Queen's Bench in the **Watier** (1984) and **George** (1985) cases and by the British Columbia Court of Appeal in **R. v. Hildebrand** (1981).

The correctness of the contrary result reached in **Gunter v. Registrar of Motor Vehicles** (1984, N.B.Q.B.) is doubtful, given the failure to at least distinguish the Supreme Court of Canada decisions directly on point.

The issue of whether such suspensions are an additional criminal penalty or a civil disability came before the Ontario Court of Appeal most recently in **Gill v. Registrar of Motor Vehicles** (1985, Ont. C.A.). The specific issue raised in that case was whether "Lord Coke's rule" (discussed below under "Subsequent Convictions") applied to the section, and not whether the section was a valid exercise of provincial power. The court held that Lord Coke's rule did apply, but in doing so it implicitly reaffirmed that the section creates a civil disability. The court referred with apparent approval to **Joslin**. As well, it reached its result by holding that Lord Coke's rule should be extended to cover a licence suspension even though it is a civil disability, and not by characterizing the section as being penal.

Section 31 of the **H.T.A.**, added by S.O. 1984, c. 21, s. 2, which clarifies the purpose of Part IV of the **H.T.A.**, would presumably be relevant if the issue should arise again.

Provincial Secretary of Prince Edward Island v. Egan, [1941] S.C.R. 396, 76 C.C.C. 227, [1941] 3 D.L.R. 305 (S.C.C.)

Ross v. Registrar of Motor Vehicles for Ont.; Bell v. A.G. P.E.I. (1973), 23 C.R.N.S. 319, 42 D.L.R. (3d) 68, 1 N.R. 9, 14 C.C.C. (2d) 322 (S.C.C.)

Bell v. A.G. P.E.I. et al. (1973), 14 C.C.C. (2d) 336, 42 D.L.R. (3d) 82, 1 N.R. 27 (S.C.C.)

R. v. Joslin (1981), 10 M.V.R. 29, 59 C.C.C. (2d) 512, 6 W.C.B. 80 (Ont. C.A.)

Benn v. Reg. of Motor Vehicles (1981), 59 C.C.C. (2d) 421, 10 M.V.R. 214 (Ont. H.C.)

Lebel v. R. (1982), 30 C.R. (3d) 285, 18 M.V.R. 84, 3 C.R.R. 263 (Que. S.C.)

Watier v. Dir. of Motor Vehicle Admin. of Sask. et al. (1984), 28 M.V.R. 134, 34 Sask. R. 27 (Sask. Q.B.)

George v. Gov't of Man. (1985), 35 M.V.R. 13 (Man. Q.B.)

R. v. Hildebrand (1981), 15 M.V.R. 150 (B.C.C.A.)

Gunter v. Reg. of Motor Vehicles for N.B. (1984), 33 M.V.R. 38, 59 N.B.R. (2d) 439, 15 D.L.R. (4th) 758, 154 A.P.R. 439 (N.B.Q.B.)

Gill v. Reg. of Motor Vehicles; Heffren v. Reg. of Motor Vehicles (1985), 35 M.V.R. 1, 21 C.C.C. (3d) 234 (Ont. C.A.), leave to appeal to S.C.C. refused (1985), 53 O.R. (2d) 488



In **Paganelli v. Ontario** (1987, Div. Ct.), the Ontario Divisional Court held that the existence of s. 242 of the **Criminal Code** [now R.S.C. 1985, s. 259], which provides for a mandatory prohibition on conviction for alcohol-related driving offences, does not render s. 41 inoperative. There is no actual conflict between the two provisions, and so the test set out in **Multiple Access Ltd. v. McCutcheon**, (1982, S.C.C.) for the doctrine of paramountcy to be invoked was not met.

Paganelli v. Ontario (1987), 6 M.V.R. (2d) 252 (Ont. Div. Ct.)

Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1

Subsequent Convictions: The current method for determination of subsequent convictions for the purposes of ss. 41 and 42 gives no consideration to the sequence of commission of offences, or whether any offence occurred before or after any conviction. The only consideration now is the sequence of convictions. The law was not always this easy. Prior to December 14, 1984, the common law applied. In **Gill v. Registrar of Motor Vehicles**, (1985, Ont. C.A.) the court revised the common law and held that the so-called "Lord Coke's rule" applied in determining when a conviction is a subsequent conviction. The Court cited with approval the following summary of the rule given by Laskin C.J.C. in **R. v. Skolnick** (1982, S.C.C.) at p. 393 C.C.C.:

- (1) The number of convictions *per se* does not govern in determining whether the Coke rule applies.
- (2) The general rule is that before a severer penalty can be imposed for a second or subsequent offence, the second or subsequent offence must have been committed after the first or second conviction, as the case may be, and the second or subsequent conviction must have been made after the first or second conviction, as the case may be.
- (3) Where two offences arising out of the same incident are tried together and convictions are entered on both after trial, they are to be treated as one for the purpose of determining whether a severer penalty applies, either because of a previous conviction or because of a subsequent conviction.
- (4) The rule operates even where two offences arising out of separate incidents are tried together and convictions are entered at the same time.

This rule applies only to convictions which took place prior to December 14, 1984, when the **Highway Traffic Amendment Act**, S.O. 1984, c.61, s. 1, came into force. The Court in **Gill** recognized this Act as an attempt by the Legislature to clarify the effect of s. 41, but held that it did not affect the case before them as the relevant convictions predated the amendment.

Sections 41(2) and 41(3) now set out the procedure for determining whether a conviction is a subsequent conviction. The sequence of convictions is now the only consideration and Lord Coke's rule, as set out in the **Gill** case, is completely nullified in regard to s. 41. As Laskin C.J.C. acknowledged in **R. v. Skolnick**, Lord Coke's "three century old cannon of construction of penal provisions...ought not to be excluded *unless the legislature has plainly said so*" [C.C.C. 389, emphasis added]. Section 42 extends the s. 41 procedure to the determination of subsequent convictions in relation to **Criminal Code** s. 242(4) charges for driving while disqualified occurring after December 20, 1985.

The effect of the amendments is shown in **Ficko** (1989, Ont. C.A.). In that case, the defendant had pleaded guilty on the same day to two counts under s. 253 of the **Criminal Code** arising out of separate incidents. The transcript of the trial indicated that the two convictions were registered one after the other and not at the same time. The Court held that the intent of the amended s. 41(2) was to render Lord Coke's rule inapplicable, and the second conviction was a "subsequent conviction" for the purposes of s.41.

The word "conviction" includes the sentence of the court. Where the accused has been found guilty but sentencing has been adjourned he is not a convicted person: see **Re R. and Smith** (1978, Sask. C.A.).

Gill v. Reg. of Motor Vehicles (1985), 35 M.V.R. 1, 21 C.C.C. (3d) 234 (Ont. C.A.)

R. v. Skolnick, [1982] 2 S.C.R. 46, 16 M.V.R. 35, 29 C.R. (3d) 143, 68 C.C.C. (2d) 385(S.C.C.)

Ficko v. Ontario (Registrar of Motor Vehicles) (1989), 13 M.V.R. (2d) 30 (Ont. C.A.)

Re R. and Smith (1978), 39 C.C.C. (2d) 229 (Sask. C.A.)

Extraprovincial Licences: The issue of whether a court in Ontario has the power to suspend a licence issued by another province and seize it under s. 211 was considered in **R. v. Boisvenu** (1975, Ont. H.C.) and **R. v. Jack** (1981, Ont. Prov. Ct.), but did not come before the Ontario Court of Appeal until **R. v. Gour** (1986, Ont. C.A.). The court there distinguished two different situations. First, it held that a province may prohibit a person holding a driver's licence issued outside its borders who breaches the **Criminal Code** or the **Highway Traffic Act** from driving in the province. In order to enforce this prohibition, the province may seize his licence and either return it to him when he leaves the province or return it to the issuing jurisdiction. This will have no effect on the status or validity of the licence under the law of the issuing jurisdiction, but merely ensures that the violator cannot drive in Ontario. Second, where the effect of the criminal conviction is to automatically suspend or revoke the licence under the law of the issuer, the judge may seize the licence in order to return it to the issuing authority. When this seizure occurs, the person will not have an exemption from the requirements of s. 32 by virtue



of s. 34(1)(a); (which permits persons from certain other jurisdictions to drive in Ontario on the strength of a licence from their home jurisdiction) and cannot continue to drive in Ontario.

R. v. Boisvenu (1975), 17 M.V.R. 86 (Ont. H.C.)

R. v. Jack (1981), 17 M.V.R. 77 (Ont. Prov. Ct.)

R. v. Gour (1986), 28 C.C.C. (3d) 52, 40 M.V.R. 139 (Ont. C.A.)

Order Extending Suspension: The power of the Judge to make an order extending a suspension under s. 416(4)(b) was held to be *intra vires* the provincial Legislature, notwithstanding that it amounts to a delegation of the provincial government's power to suspend licences (originating in s. 92 para. 15 of the **Constitution Act, 1867**) to a Judge and gives the Judge additional sentencing power. As the province has the power to suspend licences, it must be able to delegate this power to the Registrar or a judge.

R. v. Carroll (1981), 35 O.R. (2d) 532, 14 M.V.R. 175 (Ont. Co. Ct.)

In **George v. R.** (1980, Ont. Dist. Ct.) Vannini D.C.J. considered the meaning of the phrase "to be desirable for the protection of the public using the highway", and held that as the fundamental purpose of any sentence was protection of the public, an extended suspension could be upheld whether the specific goal that the judge had in mind was incapacitation, deterrence or (presumably) rehabilitation. The difficulty with this view is that (for the reasons set out above) a licence suspension does not involve a sentence but rather a civil disability. Accordingly, and particularly in view of s. 31 (added since **R. v. George**) it may be constitutionally difficult to justify an extended suspension under s. 41(4) on other than incapacitative (protection of the public) grounds.

George v. R. (1980), 8 M.V.R. 132 (Ont. Dist. Ct.)

Appeals: Because the suspension is not an additional penalty imposed for a violation of the criminal law but a civil disability arising out of a conviction for a criminal offence, any appeal from an order imposing the additional suspension must be made separate from or in addition to an appeal from sentence: see **R. v. Joslin** (1981, Ont. C.A.). Section 41(6) is not a criminal process which is *ultra vires* of the province: It simply provides for a means of appeal. Therefore, it does not encroach on the federal power over criminal law and procedure: see **Carroll v. R.** (1981, Ont. Co. Ct.).

R. v. Joslin (1981), 59 C.C.C. (2d) 512, 10 M.V.R. 29 (Ont. C.A.)

Carroll v. R. (1981), 35 O.R. (2d) 532, 14 M.V.R. 175 (Ont. Co. Ct.)

Charter Issues: Courts in several provinces have considered whether s. 41 and corresponding provisions contravene various rights and freedoms guaranteed in the **Charter**.

In **Rowland v. R.** (1984, Alta. Q.B.) the Alberta legislation corresponding to s. 48 was held not to violate s. 7 of the **Charter**.

In **R. v. Janes** (1983, B.C. Prov. Ct.) the equivalent British Columbia provision was held not to violate sections 7, 11(d), 11(h), and 12 of the **Charter**. The same result was reached in respect of s. 7 in **Zukowski v. British Columbia** (1986, B.C.S.C.) and in respect of s. 11(d) in **Johnston v. Superintendent of Motor Vehicles** (1987, B.C.S.C.).

In **Paganelli v. Ontario** (1987, Ont. Div. Ct.), the court held that s. 48 of the **H.T.A.** did not violate the **Charter**. There was no breach of s. 6, since the section is a law of general application that does not discriminate on the basis of province of residence or establish provincial barriers. There was no breach of s. 7, since holding a driver's licence is not an interest protected under s. 7. There was no breach of s. 11, since s. 41 is a civil consequence of conviction and not a punishment of a criminal nature. There was no breach of s. 15, since it is open to provinces who enact legislation to pass laws different from those enacted in other provinces.

Rowland v. R. (1984), 13 C.C.C. (3d) 367, 28 M.V.R. 239, (Alta. Q.B.)

R. v. Janes (1983), 21 M.V.R. 316 (B.C. Prov. Ct.)

Zukowski v. British Columbia (1986), 38 M.V.R. 293 (B.C.S.C.)

Johnston v. Superintendent of Motor Vehicles (1987), 46 M.V.R. 59 (B.C.S.C.)

Paganelli v. Ontario (1987), 6 M.V.R. (2d) 252 (Ont. Div. Ct.)

### **Suspension for Default in Payment of Fine: s. 46**

A justice is not required to grant a hearing before issuing an order pursuant to s. 41(2), as the act to be performed is administrative as opposed to judicial or quasi-judicial.

R. v. Giagnocavo (1975), 32 C.R.N.S. 27 (Ont. S.C.)

Licence suspensions under this section are now made by the Registrar, but the same principles presumably apply.

In **R. v. Miller** (1988, Ont. C.A.), it was held that the grounds and procedure for suspension of a licence set out in s. 46 do not violate s. 7 of the **Charter**.

R. v. Miller (1986), 41 M.V.R. 141 (Ont. H.C.), aff'd (1988), 5 M.V.R. (2d) 236 (Ont. C.A.)

### Spot Checks: s. 48

Common Law: In **R. v. Dedman** (1985, S.C.C.) the court considered whether the police had the power at common law to stop motor vehicles at random to check the condition and insurance of motor vehicles and the licences and condition of drivers. The majority held that these random stops fell within the general scope of police duties. Further, they were not an unjustifiable use of police power, as such spot checks were necessary and reasonable having regard to the nature of the liberty interfered with, the important public purpose served, and the minor inconvenience to the party. Accordingly, on the test of police powers set out in the leading English case of **R. v. Waterfield** (1963, C.A.), there was common law authority for such stops.

R. v. Dedman (1985), 20 C.C.C. (3d) 97, 46 C.R. (3d) 193, 34 M.V.R. 1 (S.C.C.)

R. v. Waterfield, [1963] 3 A11 E.R. 659 (C.A.)

It should be noted that s. 48 was enacted after the facts of **R. v. Dedman** arose and the court made no reference to that section in its decision.

Effect of Section: The effect of s. 48 is twofold. Section 48(1) establishes a specific power permitting police officers to stop motor vehicles in order to conduct spot checks to see if there are grounds for a demand under s. 254 of the **Criminal Code**. (There is a general power to require a driver to stop in s. 216 of the **H.T.A.**) The remainder of the section (discussed below under "Temporary Suspension") deals with the power of a police officer to request the surrender of a licence and the twelve-hour suspension that follows from such a request.

There is some question as to whether s. 48 itself creates an offence or whether it simply confers the power on a police officer to require a driver of a motor vehicle to stop (compare the wording of s. 48 with ss. 216(1), (2)). The better course of action where a driver fails to stop after being directed to do so under s. 48 is probably to lay a charge under s. 216, since the police officer is acting "in the lawful execution of his duties and responsibilities" by requiring a driver to stop under s. 48.

On the interpretation of "readily identifiable as such", see the annotation to "Fail to Stop for Police: s. 216", below.



Constitutional Validity: In **R. v. Thombs** (1986, Ont. Prov. Ct.), it was held that s. 48 was not valid provincial legislation because it was, in substance, criminal law and beyond the legislative jurisdiction of the province. It is respectfully submitted that this conclusion is incorrect. First, it appears that the learned judge proceeded on the basis that s. 48 creates an offence, which for the reasons outlined above is probably not correct. Second, the learned judge placed heavy emphasis on the fact that the section is not limited to traffic on a highway, although this was held not to be fatal to s. 216 in **R. v. Hisey** (1985, Ont. C.A.). Although the learned judge refers to **R. v. Hisey**, he adverts to a passage that has to do with the creation of offences. Third, the learned judge emphasizes the relation between the section and the provisions of the **Criminal Code**, but fails to consider the acute dangers posed by intoxicated drivers to motor traffic generally and the interests covered by the provincial heads of power set out in **R. v. Hisey** (for a review of the empirical evidence on this point and the conclusions that may be drawn from it, see **R. v. Seo**, (1986, Ont. C.A.) and **R. v. Thomson**, (1988, S.C.C.). Section 48(1) forms one part of a larger scheme created by s. 48 as a whole that seeks to protect those valid provincial interests by preventing individuals who meet certain criteria from *continuing* to drive while intoxicated, whether or not their *past* conduct leads to criminal charges. It is suggested for these reasons that **Thombs** is wrongly decided and that s. 48(1) is supported by the same heads of provincial power as those set out in **R. v. Hisey** (1985, Ont. C.A.).

In **R. v. Gerelus** (1985, Ont. Dist. Ct.) Cusinato D.C.J. held that s. 48 was valid provincial legislation.

**R. v. Thombs** (1986), 50 M.V.R. 31 (Ont. Prov. Ct.)

**R. v. Hisey** (1985), 24 C.C.C. (3d) 20, 40 M.V.R. 52 (Ont. C.A.), leave to appeal to S.C.C. refused (1986), 67 N.S. 160.

**R. v. Seo** (1986), 25 C.C.C. (3d) 385, 38 M.V.R. 161 (Ont. C.A.)

**R. v. Thomson**, [1988] 1 S.C.R. 640, 40 C.C.C. (3d) 411, 4 M.V.R. (2d) 185

**R. v. Gerelus** (1985), 14 W.C.B. 342 (Ont. Dist. Ct.)

Charter: A series of cases have considered whether the power to stop conferred by s. 48(1) violates the **Charter**. While the section has generally been held not to infringe the **Charter**, two different lines of reasoning have been used to reach this conclusion. In **R. v. Fraser** (1984, Ont. Co. Ct.), it was held in brief reasons that s. 48(1) did not violate ss. 7, 8 or 9 of the **Charter**. This holding was followed in **R. v. Sandmoen** (1986, Ont. Dist. Ct.) and **R. v. Drennan** (1986, Ont. Dist. Ct.). A different approach was taken in **R. v. Dmitrew** (1987, Ont. Dist. Ct.). Kurisko D.C.J. in considered reasons held that s. 48(1) infringes s. 9 of the **Charter**, but is saved by the application of s. 1.

The opposite conclusion was reached in **R. v. Rohde**, (1986, Ont. Prov. Ct), where Menzies P.C.J. held that s. 48(1) violated s. 9 of the **Charter** to the extent that it authorizes a stop not based on reasonable and probable grounds. It appears to have been common ground in that case between the Crown and defence that any such violation could not be saved by s. 1, and so that issue was not addressed.

It is submitted that the approach taken by Kurisko D.C.J. in **Dmitrew**, and the result reached, are correct in view of **R. v. Hufsky** (1988, S.C.C.) and **R. v. Ladouceur** (1990, S.C.C.). In those cases, the Supreme Court upheld the validity of random stops under s. 216(1) of the **Highway Traffic Act**, whether or not such stops form part of an organized spot check programme. While such stops may violate s. 9 of the **Charter**, they are saved by the application of s. 1. The same reasoning and conclusion would presumably apply to s. 48(1).

R. v. Fraser (1984), 28 M.V.R. 209 (Ont. Co. Ct.)

R. v. Sandmoen (1986), 43 M.V.R. 255 (Ont. Dist. Ct.)

R. v. Drennan, [1986] Ont. D. Crim. Conv. 5570-08 (Ont. Dist. Ct.)

R. v. Dmitrew (1987), 49 M.V.R. 64 (Ont. Dist. Ct.)

R. v. Hufsky, [1988] 1 S.C.R. 621, 40 C.C.C. (3d) 398 (S.C.C.)

R. v. Ladouceur, [1990] 1 S.C.R. 1257, 56 C.C.C. (3d) 22, 21 M.V.R. (2d) 165

### **Licence Suspension for Twelve Hours: s. 48(2)-(13)**

Introduction: Section 48, in addition to confirming the authority of police officers to stop motor vehicles to determine whether there is evidence to justify a demand under the **Criminal Code**, also provides a mechanism for twelve-hour suspension of a driver's licence.

Constitutional Validity: In **R. v. Wolff** (1979, B.C.C.A.) the corresponding provision of the British Columbia **Motor Vehicle Act** was held to be *intra vires* the legislative power of the province.

R. v. Wolff (1979), 1 M.V.R. 481 (B.C.C.A.)

By virtue of s. 48(13)(a) a "driver's licence" in this section includes a licence issued by any other jurisdiction. There is an issue whether legislation passed by the province of Ontario can render a licence issued by another province "suspended and invalid for any purpose" (see s. 48(5)). **R. v. Gour** (1986, Ont. C.A.) held that a province has the power to *prohibit* a person who holds a driver's licence issued by another jurisdiction from driving in the province, and may enforce this by seizing the licence. However, **Gour** deals with prohibitions of a driver and not with suspensions of a licence.



There is still an issue whether a section that purports to *suspend* a licence can be interpreted to create a *prohibition* from driving. (Note that s. 36 does not solve this problem since it also refers to a "suspension").

R. v. Gour (1986), 28 C.C.C. (3d) 52 (Ont. C.A.)

Operation of the Provisions: The circumstances where a licence suspension under s. 48(5) is available are set out in s. 48(2), (3) and (4). Note that a 12-hour licence suspension is not available where a criminal charge is laid if that charge is supported by a breathalyzer reading of less than 50 milligrams or if no demand is made under s. 254 of the **Criminal Code**. Note also, however, that there is no requirement that a charge be laid as a result of the sample provided as long as the results specified in s. 48(2) or (3) are obtained. The suspension is also available where the person fails or refuses to comply with a demand made under s. 254, but this requires that a person be charged with the offence under s. 254 or that process be issued to compel him to attend court with respect to the charge: see s. 41(4).

A s. 254 demand, however, can only be made where there are grounds justifying such a demand. There can be no suspension under the **H.T.A.** unless a s. 254 demand has been made. The standard for making a demand is, necessarily, the same standard as is required in s. 254. Here a difficulty arises because s. 48(2) and (3) do not specify which subsection of s. 254 supplies this standard. Two standards are employed in s. 254. Section 254(2) refers to a "roadside screening test"; here, the officer need only "reasonably suspect" that the driver has alcohol in his body. Section 254(3) involves breathalyzer testing; this type of demand can only be made where the police officer believes on reasonable and probable grounds that the person is committing, or has within two hours committed, a s. 253 offence.

It would seem that if the spot check demand is made under s. 48(2) (roadside test) the "reasonable suspicion of alcohol" standard is sufficient grounds for the police demand. On the other hand, if the officer making the spot check is using a breathalyzer machine under s. 48(3), he must believe on reasonable and probable grounds that the driver has consumed alcohol *and* that an offence under s. 253 has been committed.

Charter Issues: A series of cases have considered the constitutional validity of short-term licence suspensions.

In **R. v. Robson** (1985, B.C.C.A.), the court held that the then-existing B.C. legislation which permitted a 24-hour licence suspension violated s. 7 of the **Charter** and was too vague and uncertain to be a "reasonable limit" that could be saved under s. 1. That legislation required only that the police officer have "reason to suspect that the driver had consumed alcohol". There were no criteria as to the time or amount of consumption, no requirement that the driver be under the influence of alcohol, and no requirement that the officer consider the individual's ability to drive.

The British Columbia legislation was subsequently amended to require "reasonable and probable grounds to believe that a driver's ability to drive a motor vehicle is affected by alcohol". The amended legislation was upheld as a reasonable limit under s. 1 in **R. v. Sengara** (1988, B.C.S.C.)

In **R. v. Ferris** (1985, Alta. Prov. Ct.), the Alberta legislation was held not to violate s. 7. That legislation required that "a police officer suspect that the driver of a motor vehicle has consumed alcohol...in such a quantity as to affect the driver's physical or mental ability". While expressing some concern about the requirement of "suspicion", the court upheld the legislation.

Subsequently, in **R. v. Neale** (1986, Alta. Q.B.), McDonald J. held that the Alberta legislation violated s. 7 of the **Charter**. It could not be saved under s.1, since it merely required "suspicion" on the part of the police officer, and did not require either a belief on the officer's behalf or reasonable and probable grounds for such a belief. The Alberta Court of Appeal reversed, holding that the suspension of driving privileges was not a violation of "liberty" under s. 7 of the **Charter**. Leave to appeal to the Supreme Court of Canada was denied.

In **R. v. Heidel** (1986, Sask. Q.B.), the Saskatchewan legislation, which required "reasonable and probable grounds" to believe that a driver had consumed alcohol to an amount not less than 60 milligrams per 100 millilitres of blood was held not to violate s. 7 since it could not be said to be contrary to the principles of fundamental justice.

There appear to be no Ontario cases dealing with the constitutionality of s. 48. Two points should be noted. First, while the effect of the incorporation by reference of s. 254 of the **Code** in s. 48(2) is that a police officer need only "reasonably suspect...alcohol in the person's body", this in itself is not enough for suspension of a licence (as was the case under the provisions ruled unconstitutional in **Robson**); the licence suspension is only available where the *actual presence* of a particular proportion of alcohol in the blood is established. Accordingly, the criticisms made in **Robson** do not apply to the Ontario legislation.

Second, the Ontario legislation, with its twelve-hour suspension will be easier to justify as a "reasonable limit" under s. 1, since it is more closely tied to the policy of removing drivers from the road while they are actually under the influence of alcohol.

**R. v. Robson** (1985), 19 C.C.C. (3d) 137, 31 M.V.R. 220 (B.C.C.A.) affirming (1984), 28 M.V.R. 167 (B.C.S.C.)

**R. v. Sengara** (1988), 8 M.V.R. (2d) 231 (B.C.S.C.)

**R. v. Ferris** (1985), 33 M.V.R. 167 (Alta. Prov. Ct.)

**R. v. Neale** (1986), 28 C.C.C. (3d) 345, 43 M.V.R. 194 (Alta. C.A.), rev'g (1985), 34 M.V.R. 245 (Q.B.) leave to appeal to S.C.C. refused 4 M.V.R. (2d) xxxviii

**R. v. Heidel** (1986), 27 C.R.R. 63 (Sask. Q.B.)

A suspension under s. 48 does not involve charging a driver with an offence, and so s. 11(d) of the **Charter** does not apply.

R. v. Huber (1985), 36 M.V.R. 10 (Ont. C.A.), leave to appeal to S.C.C. refused (1985), 36 M.V.R. xxxviii

R. v. Art (1987), 39 C.C.C. (3d) 563, 7 M.V.R. (2d) 132 (B.C.C.A)

R. v. Ferris (1985), 33 M.V.R. 167 (Alta. Prov. Ct.)

**Multiple Convictions:** The rule against multiple convictions does not apply to a person charged with a s. 253 offence as well as driving while suspended pursuant to a spot check temporary suspension. In **A.-G. B.C. v. Bennewith** (1983, B.C.S.C.) the defendant had been given a 24-hour suspension which he chose to ignore. He was then charged with "over 80" and driving while suspended (in relation to the roadside suspension). It was held that *res judicata* was unavailable even though the defendant's driving was one continuous circumstance common to the laying of both charges. The elements of the two offences were so substantially different that the rule against multiple convictions did not apply. The "over 80" offence is directed towards driving while the defendant has a certain physical condition, while the other offence is directed towards driving while the defendant has a legal status that prohibits him from doing so.

In **R. v. Huber** (1985, Ont. C.A.) the Ontario Court of Appeal held that a temporary suspension under s. 41 was not a conviction for an offence. Accordingly, the plea of *autrefois convict* was not available to a person who was charged with a s. 253 offence and had his licence suspended under s. 48 for 12 hours.

A.-G. B.C. v. Bennewith (1983), 48 M.V.R. 1 (B.C.S.C.)

R. v. Huber, (1985), 36 M.V.R. 10 (Ont. C.A.), leave to appeal to S.C.C. refused (1985), 36 M.V.R. xxxviii

**Records:** Section 48(10) indicates that a police officer shall record the particulars of each suspension he effects under s. 48. In British Columbia an officer must also forward such reports to the superintendent. In **R. v. Hardy** (1983, B.C.S.C.) it was held that proof of reporting was not a prerequisite to a conviction for an offence of driving while under roadside suspension. The suspension operates automatically upon the request to surrender the driver's licence. The reporting provisions are merely administrative.

R. v. Hardy (1983), 22 M.V.R. 239 (B.C.S.C.)

### **Appeal Procedures: s. 50**

A judge hearing an appeal under s. 50(3) and (4) is not limited to a consideration of errors of law, but may decide the matter on a hearing *de novo*. At the hearing, the onus is on the Registrar to show cause, on a balance of probabilities, why the licence should be suspended.



Re Williams and Registrar of Motor Vehicles (1973), 2 O.R. (2d) 473 (Co. Ct.)

Johnson v. Registrar of Motor Vehicles (1985), 34 M.V.R. 80 (Ont. Dist Ct.)

The decision whether to suspend or revoke a licence involves a delicate balance. On the one hand, there is the individual's right to a livelihood. On the other, the public has an interest in not being exposed to the unreasonable risk of powerful and potentially dangerous vehicles in the hands of drivers who for health reasons pose an unreasonable danger.

Johnson v. Registrar of Motor Vehicles, (1985), 34 M.V.R. 80 (Ont. Dist Ct.)

### **Service: s. 54**

Operation: While s. 54 clearly creates a method whereby a driver *may* be given notice of suspension of his driver's licence, the issue has arisen whether the section goes beyond this and that notice must be given for a suspension to be effective. In **R. v. Mudryk** (1978, S.C.C.), a substantially similar section of the Alberta **Motor Vehicles Administration Act, 1975** was held to create such a mandatory requirement. However, in **R. v. Dynes** (1977, Ont. H.C.) s. 30a (now s. 52) of the **H.T.A.** was discussed as "a method of giving notice of suspension in cases where notice is not delivered personally", and was held not to create any requirement for service. The same result was reached in **R. v. Tanner** (1978, Ont. Dist. Ct.), where Vannini D.C.J. appears to consider and reject the view that the Ontario legislation as a whole creates an implied requirement for service under s. 52.

**Mudryk** may no longer represent the law with respect to the provincial offence of driving while suspended since **R. v. Christman** (1984, Alta. C.A.). The court there held that where a statutory suspension follows immediately upon conviction for certain offences, it is not necessary for proof of notice of any kind to be adduced in a charge of driving while suspended under provincial legislation.

R. v. Mudryk (1977), 38 C.C.C. (2d) 259, 1 C.R. (3d) 160 (Alta. C.A.) aff'd [1978] 1 S.C.R. 97, 1 M.V.R. 157 (S.C.C.)

R. v. Dynes (unreported, Ont. H.C., July 22, 1977, per Weatherston J.)

R. v. Tanner (1978), 1 M.V.R. 145 (Ont. Dist. Ct.)

R. v. Christman (1984), 29 M.V.R. 1 (Alta. C.A.)

Assuming that the view outlined above is correct and that (for the reasons outlined below under "Driving While Driver's Licence Suspended: s. 53") the offence under s. 53 is one of strict liability, the Crown is not required to prove that notice of the suspension was given to the defendant. Proof of compliance with s. 52 makes it more difficult for a defendant to raise a defence of honest and reasonable mistake of fact or due diligence. The section requires the defendant to prove on the balance of probabilities "that he or she did not, acting in good faith, through absence, accident, illness or other cause beyond his control, receive the notice". Arguably, this is a more restrictive defence than the defences of due diligence and honest and reasonable mistake of fact normally available to strict liability offences.

There is a statutory duty on every holder of a driver's licence to notify the Ministry of any change in address: see R.R.O. 1990, Reg. 585, s. 24. Arguably, the deemed notice provision would apply where a driver has failed to keep his address current with the Ministry and notice of the suspension was sent to his former address.

Charter Issues: In **R. v. Johnson** (1984, B.C.S.C.) and **R. v. Alston** (1985, B.C.C.A.) the British Columbia legislation with respect to proof of knowledge of a suspension was held to violate s. 11(d) of the **Charter**. The statute in s. 88(1) created an offence of driving knowing one's driver's licence was suspended (unlike Ontario, where knowledge is not an element of the offence). Section 88(2) provided that a certificate of the Registrar stating that a defendant was prohibited or suspended was proof that the defendant knew of the prohibition or suspension unless he established, on a balance of probabilities, that he did not. The section made no mention of the mailing of notice. The courts in both cases held that the provision was unconstitutional since there was no connection between the proven fact and the presumed fact.

R. v. Johnson (1984), 28 M.V.R. 84 (B.C.S.C.)

R. v. Alston (1985), 22 C.C.C. (3d) 563 (B.C.C.A.)

The Manitoba notice provisions have also been held to violate the **Charter**. These provisions are similar to the Ontario legislation except that they provide that mailing of a notice is conclusive proof of service, and do not provide any opportunity for a defendant to establish on a balance of probabilities that he did not receive such notice (unlike the Ontario legislation). This was held to create an offence of absolute liability, which violated s. 7 of the **Charter**.

R. v. Blackbird (1983), 22 M.V.R. 130 (Man. Prov. Ct.)

Manitoba Public Insurance Co. v. Paul (1985), 35 M.V.R. 153 (Man. Q.B.)

R. v. Courchene (1986), 45 M.V.R. 84 (Man. Prov. Ct.)



The issue came before the Ontario Court of Appeal in **R. v. Middlebrook** (1988, Ont. C.A.) where the court held that s. 52 did not violate either s. 7 or s. 11(d) of the **Charter**.

*R. v. Middlebrook, R. v. Miller, R. v. Laporta* (1988), 5 M.V.R. (2d) 236 (Ont. C.A.)

In **R. v. Demelo** (1988, B.C. Prov. Ct.) it was held that a section that affords a defendant an opportunity to lead evidence of a fact that is peculiarly within his knowledge and that may rebut an inference that could otherwise be reasonably drawn does not compel a defendant to be a witness against himself, and therefore does not violate s. 11(c) of the **Charter**.

*R. v. Demelo* (1982), 3 C.R.R. 376 (B.C. Prov. Ct.)

### **Driving While Driver's Licence Suspended: s. 53**

Nature of Offence: In Nova Scotia (**R. v. MacDougall**, 1982, S.C.C., **R. v. MacLellan**, 1983, C.A.), Manitoba (**R. v. Coleman**, 1985, Q.B.), Alberta (**R. v. Christman**, 1984, C.A.) and Quebec (**Richard v. R.**, 1979, Sup. Ct., **Procureur General v. Tremblay**, 1980, C.A.) driving while suspended has been held to be a strict liability offence.

*R. v. MacDougall*, [1982] 2 S.C.R. 605, 18 M.V.R. 180, 31 C.R. (3d) 1, 1 C.C.C. (3d) 65 (S.C.C.)

*R. v. MacLellan* (1983), 23 M.V.R. 236, 60 N.S.R. (2d) 448, 128 A.P.R. 448 (N.S.C.A.)

*R. v. Coleman* (1985), 31 M.V.R. 258 (Man. Q.B.)

*R. v. Christman* (1984), 29 M.V.R. 1 (Alta. C.A.)

*Richard v. R.* (1979), 14 C.R. (3d) 165 (Que. Sup. Ct.)

*Procureur General v. Tremblay* (1980), 7 M.V.R. 196 (Que. C.A.)

Section 94(2) of the **Motor Vehicle Act**, R.S.B.C. 1979, c. 288 states that the British Columbia proscription regarding suspended or prohibited driving "creates an absolute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension". In a reference regarding this provision the Supreme Court of Canada held that this absolute liability offence violated the right to liberty in s. 7 of the **Charter** because the penalty provided was incarceration (**Reference Re s. 94(2)**, 1985, S.C.C.). The predecessor to this section had been considered in **R. v. Jack** (1983, B.C.S.C.), heard after the Court of Appeal's decision in the **Reference Re 94(2)** case. The minor differences in the amended legislation were not in issue. Hinds J. held that the provision created a strict liability offence. This would seem to represent the current law in British Columbia.

Reference Re Section 94(2) of the Motor Vehicle Act (B.C.) (1985), 23 C.C.C. (3d) 289, 48 C.R. (3d) 290, 36 M.V.R. 240 (S.C.C.)  
R. v. Jack (1983), 21 M.V.R. 198 (B.C.S.C.)

In **R. v. Robertson** (1984, Ont. Prov. Ct.), Langdon P.C.J. held that the holding in **R. v. MacDougall** (1982, S.C.C.) was equally applicable to the Ontario provision and that s. 53 creates a strict liability offence. It is submitted that this is correct. The view that it does not create an offence of absolute liability is supported by the overall regulatory pattern adopted by the Legislature (see especially s. 52) and the severity of the penalty, while the fact that the offence is a public welfare offence that does not include any words importing a mental element suggests that it is not a full *mens rea* offence. It would appear from **R. v. Middlebrook** (1988, Ont. C.A.) that the Ontario Court of Appeal accepts that s. 53 creates a strict liability offence.

R. v. Robertson (1984), 30 M.V.R. 248, 43 C.R. (3d) 39 (Ont. Prov. Ct.)

R. v. Middlebrook, R. v. Miller, R. v. Laporta (1988), 5 M.V.R. (2d) 236 (Ont. C.A.)

Form of Information: In **R. v. West** (1981, Ont. H.C.) an information charging that the defendant "did operate a motor vehicle on a highway...when his driver's licence was suspended..." but containing a reference to the section number creating the offence was held to be defective. However, it was curable by amendment under s. 25 of the **Provincial Offences Act**. A lower court decision quashing the information as a nullity was set aside.

R. v. West (1981), 64 C.C.C. (2d) 487 (Ont. H.C.)

In **Dasilva v. R.** (1988, Ont. Prov. Ct.), an information charging the defendant with "driving while under suspension" and referring to the section number, but omitting the word "licence", was held to be a nullity and to be incapable of amendment under s. 25 of the **Provincial Offences Act**. This case was specifically held to be wrongly decided in light of s. 25(3) of the **Provincial Offences Act** in **R. v. Shier** (1987, Ont. H.C.J.).

Dasilva v. R. (unreported, Ont. Prov. Ct., Nov. 24, 1986, per Langdon P.C.J.)

R. v. Shier, (unreported, Ont. H.C., November 17, 1987, per Hughes J.)

Applicability on Indian Reservation: In **R. v. Maloney** (1982, N.S.C.A.) a charge under the provincial **Motor Vehicles Act**, rather than under the **Indian Reserve Traffic Regulations**, was held to be appropriate. The regulations made no specific provision for driving while suspended, but provided:

6. The driver of any vehicle shall comply with all laws and regulations relating to motor vehicles, which are in force from time to time in the province in which the Indian reserve is situated, except such laws or regulations as are inconsistent with these Regulations.

The court, adopting **R. v. Twoyoungmen** (1979, Alta. C.A.), held that this section did not incorporate by reference the provincial legislation, but was merely a declaratory reminder of the provisions of the **Motor Vehicle Act**. Accordingly, the charge was appropriately laid under the **Motor Vehicle Act** and not the **Indian Act**.

R. v. Maloney (1982), 15 M.V.R. 121 (N.S.S.C.A.D.)

R. v. Twoyoungmen (1979), 3 M.V.R. 186 (Alta. C.A.)

Indian Act, R.S.C. 1970, c. I-6

Indian Reserve Traffic Regulations, C.R.C. 1978, c. 959

Effect of Valid Out-of-Province Licence: In **R. v. Bar** (1983, Ont. Prov. Off. Ct.) the defendant had surrendered his Ontario licence in October of 1981 to the Province of Alberta in order to obtain an Alberta licence. In March of 1982 his Ontario licence was suspended for non-payment of fines. The defendant was charged with driving while suspended in Ontario in July of 1983. The trial court held that the individual's privilege to drive in Ontario was suspended and registered a conviction, notwithstanding that he then held a valid Alberta licence. Subsequent appeals to the Provincial Offences Appeal Court and the Court of Appeal were dismissed.

R. v. Bar (unreported, P.O.A. Ct., Judicial District of York, Nov. 8, 1983, per Piccinin J.P., aff'd Prov. Ct., Jan. 6, 1984, per Scott P.C.J., aff'd Ont. C.A., Oct. 7, 1988, per Dubin A.C.J.O., Zuber and Finlayson J.J.A.)

See also s. 36 of the H.T.A.

Effect of Payment of Fines on Suspension: In **R. v. Zembal** (1987, Ont. Prov. Ct.) the defendant had paid off all fines owing (for which his licence had been under suspension). He was stopped the next day and charged with driving while suspended. At that time, his licence had apparently not been reinstated because of an administrative delay. The court held the *actus reus* of the offence was not made out, since the defendant was legally entitled to reinstatement of his licence and his status could more accurately be described as "pending reinstatement" rather than "under suspension".

This position is strengthened by subsequent amendments to the **Highway Traffic Act**. At the time the facts in **Zembal** arose, the **H.T.A.** required judicial orders both to suspend and direct the reinstatement of a licence (see R.S.O. 1980, c. 198, s. 29). The section now reads:



29(1) Where a person is in default of payment of a fine imposed upon conviction for an offence against this Act...an order may be made under subsection 69(2) of the **Provincial Offences Act** directing that,

- (a) the person's driver's licence be suspended; and
- (b) no driver's licence be issued to that person,  
*until the fine is paid.* [emphasis added]

On a plain reading of the section the suspension now expires at the time the fine is paid.

R. v. Zembal (1987), 1 M.V.R. (2d) 335 (Ont. Prov. Ct.)

Validity of Out of Province Suspension: Provincial suspensions of driving privileges are only valid in the province in which they are imposed. A prohibition, made pursuant to provincial legislation, from driving "any motor vehicle on any highway in Canada" is beyond the jurisdiction of the provinces: **James v. R.**, (1984, B.C. Co. Ct.).

Some provinces, however, have legislated reciprocal licence suspension agreements (see, for example, s. 307 of the **Motor Vehicle Act**, R.S.N.B. 1993).

In Ontario s. 198(4) may apply so as to suspend the driver's licence of a person who fails to satisfy an out-of-province judgment rendered against him.

James v. R. (1984), 28 M.V.R. 48 (B.C. Co. Ct.)

Defences: Officially Induced Error: The general principles governing the defence are set out in "Defences: Mistake of Law and Officially Induced Error" under General Principles and Defences, supra. As noted there, the Ontario Court of Appeal in **R. v. Cancoil Thermal Corporation and Parkinson** (1986, Ont. C.A.) recognized the defence notwithstanding the existence of s. 80 of the **Provincial Offences Act**. The classic statement of the defence is found at p. 303:

The defence of "officially induced error" is available as a defence to an alleged violation of a regulatory statute where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law. In order for the accused to successfully raise this defence, he must show that he relied on the erroneous legal opinion of the official and that his reliance was reasonable. The reasonableness will depend upon several factors including the efforts he made to ascertain the proper law, the complexity or obscurity of the law, the position of the official who gave the advice, and the clarity, definitiveness and reasonableness of the advice given.

A series of cases have considered the operation of the defence of officially induced error in the offence of driving while suspended. In **R. v. MacDougall** (1982, S.C.C.) the defendant raised officially induced error as a defence. The defendant's licence had been suspended as a result of a conviction for an offence under the **Criminal Code**. He appealed this conviction, and received a notice indicating that he would be deemed by the Registrar of Motor Vehicles not to have been convicted (and accordingly that his licence would not be suspended) "until the appeal has been heard...and dismissed". The appeal was dismissed, and the defendant was subsequently stopped and charged with driving while suspended. The court held that if the defence did exist it was not available on the facts of the case, since there was no indication that the defendant was misled by any error of the Registrar. The case is consistent with **Cancoil Thermal** in requiring actual reliance on official advice, and not a simple misapprehension of one's legal position.

In **R. v. Sangha** (1984, B.C. Co. Ct.) the defendant had been convicted of a **Criminal Code** offence that carried an automatic concurrent licence suspension under the provincial **Motor Vehicle Act**. His licence was already under suspension. When the pre-existing suspension expired his licence was returned to him, in error, by the Registrar. On a subsequent charge of driving while suspended he attempted to raise a defence of officially induced error, was unsuccessful at trial, and appealed. The appeal court held that the defence was open on the charge and sent the matter back for a new trial to determine whether the mistake made was reasonable. It should be noted that the facts of the case were somewhat unusual. The defendant had little facility in English, there was no evidence that the defendant had been informed at the trial of the **Criminal Code** offence that conviction would result in a licence suspension under provincial legislation, and there was no evidence of any documentation sent to the defendant informing him of the suspension. It is submitted that this case is not authority for the proposition that the return of a driver's licence by the Registrar is of itself sufficient to give rise to a defence of officially induced error. Arguably, the fact that conviction for certain offences under the **Criminal Code** results in a provincial suspension of a driver's licence is so well-known that reliance upon the simple receipt of a driver's licence is not reasonable, even where there is no proof that the defendant was actually notified of the suspension.

In **R. v. Robertson** (1985, Ont. Prov. Ct.), Langdon P.C.J. appears to hold that the defence might have been available on the facts but for the operation of s. 80 of the **P.O.A.** (on this point, the case is now overruled by **Cancoil Thermal**). The defendant had received two speeding tickets but had lost them, so did not know where the fine was supposed to be sent. She accordingly sent a cheque to the Ministry of Transportation. Subsequently, she received a notice that her driver's licence was suspended for unpaid fines. She contacted the number given for information on the notice and informed the person that she spoke to that she had remitted the payments, and testified that the person she spoke to had told her that she should wait a week or ten days before driving. She was subsequently charged



for driving while suspended. It is submitted that any reliance on the advice here was not reasonable, and the defence should not have been available. The notice of suspension the defendant received stated plainly, "Only the convicting court can receive payment", and the defendant did not inform the person she spoke to that she had remitted the payment to the Ministry rather than the convicting court. It is difficult to see how reliance can be reasonable where the person seeking the advice knowingly or negligently misstates the material facts upon which that advice is based.

Cancoil Thermal Corporation and Parkinson (1986), 27 C.C.C. (3d) 285, 52 C.R. (3d) 188 (Ont. C.A.)

R. v. MacDougall, [1985] 2 S.C.R. 605, 1 C.C.C. (3d) 65, 18 M.V.R. 180

R. v. Sangha (1984), 20 M.V.R. 28 (B.C. Co. Ct.)

R. v. Robertson (1984), 30 M.V.R. 248, 43 C.R. (3d) 39 (Ont. Prov. Ct.)

Defences: Due Diligence and Reasonable Mistake of Fact: Curiously, it was a driver's licence case that became the impetus for the creation of strict liability offences. In **R. v. Sault Ste. Marie** (1978, S.C.C.) Dickson J. as he then was, related (at C.R. p. 44):

"The case which gave the lead in this branch of the law is the Australian case of **Proudman v. Dayman** (1948), 67 C.L.R. 536, where Dixon J. said, at p. 540:

It is one thing to deny that a necessary ingredient of the offence is positive knowledge of the fact that the driver holds no subsisting licence. It is another to say that an honest belief founded on reasonable grounds that he is licensed cannot exculpate a person who permits him to drive. As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence".

In **R. v. MacLellan** (1983, N.S.C.A.) the court held that, since the offence of driving while suspended is one of strict liability (at 242):

...(1) the Crown did not have to prove that [the defendant] had knowledge of the revocation of his licence, and (2) [the defendant] had to prove on a balance of probabilities that all reasonable care was taken to avoid the commission of the offence....As the burden of proof was on [the defendant] it was incumbent upon him to establish on the balance of probabilities by credible evidence the defence of mistake of fact or the absence of negligence.

It is submitted that, subject to the requirement that the mistake of fact must be reasonable, this is an accurate statement of the law in Ontario.

In **R. v. Coleman** (1985, Man. Q.B.) the defendant was acquitted where it was acknowledged that the defendant's licence was suspended but he argued that he had no knowledge of the suspension. Notice had been mailed to the last address for him on the files of the Ministry but was returned marked "unknown". The court held that the offence required "a degree of awareness on the part of [the defendant]", and since the defendant was not notified of his suspension, he reasonably believed that he had the right to drive. It is submitted that this case is wrongly decided. First, as noted above, awareness of suspension is not an element of the offence, but goes to the defences that may be raised. Second, in such a case the defendant should be required to show that he had no knowledge of the facts giving rise to the suspension (the reason is not stated in the judgment), and that he had not changed his address, before his belief can be said to be reasonable.

It is submitted that the defences of due diligence and honest and reasonable mistake of fact must be assessed in light of the various statutory duties placed on drivers by the **Highway Traffic Act**. Section 46(2) and **O.Reg. 584** create a statutory duty to pay outstanding fines if suspension of one's driving privileges is to be avoided. A driver is also required to notify the Ministry of any change in address (see s. 9(2) with respect to vehicle permits and **O.Reg. 587**, s. 24 with respect to drivers' licences). These statutory duties should constitute the minimum due diligence required or (put another way) the minimum standard that must be met before a belief that one's driving privileges have not been suspended can be said to be "reasonable".

The mistake of fact must be honest as well as reasonable. In **R. v. McFerran** (1983, B.C. Co. Ct.), the trial judge's assessment of the defendant and his witnesses as incredible was not disturbed on appeal.

In **R. v. Azzoli** (1983, Ont. Prov. Ct.) both due diligence and honest and reasonable mistake of fact seem to have been considered. On May 4, 1983 the defendant received a notice stating that his driver's licence was suspended effective May 17, 1983 for unpaid fines. The notice further stated that "to reinstate your licence takes a minimum of ten working days after your payment is received by the Court, therefore it is important that your payment be made immediately if you are to avoid suspension". The defendant was leaving town so apparently instructed his secretary to call the Court and get the matter straightened out. Some time after he returned, he was stopped and charged with driving while suspended. The court stated (at 208-209):

He went about it in the way that any reasonable man would have done, gave it to his secretary, asked her to look after it...and he assumed it was done as I think a reasonable person could assume it was done.

Given the importance of the matter, it may be questioned whether assuming that the matter was "straightened out" without checking constitutes either due diligence or a reasonable basis for belief.

For issues regarding service of notice see also the annotations to s. 52.

R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299 (S.C.C.); for full citation see table of cases

Proudman v. Dayman (1948), 67 C.L.R. 536 (Aust. H.C.)

R. v. MacLellan (1983), 23 M.V.R. 236, 60 N.S.R. (2d) 448, 128 A.P.R. 448 (N.S.C.A.)

R. v. Coleman (1985), 31 M.V.R. 258 (Man. Q.B.)

R. v. McFerran (1983), 24 M.V.R. 303 (B.C. Co. Ct.)

R. v. Azzoli (1983), 24 M.V.R. 205 (Ont. Prov. Ct.)

Multiple Convictions: There has been some dispute as to whether a conviction for "drive motor vehicle--no licence" (s. 32(1)) precludes a conviction for driving while under suspension. In **R. v. Preeper** (1984, B.C. Prov. Ct.) the defendant was stopped by the police and charged with driving without a licence. He paid the ticket out of court. Four months later an information was sworn alleging, on the same facts, that he drove while under suspension. It was held that the act which underlies a "drive motor vehicle--no licence" charge is the same act that underlies a driving while under suspension charge and that the evil aimed at in the two offences is similar. As a result the conviction on the lesser charge was held to bar a conviction on the suspended driving charge.

In **R. v. Moody** (1985, B.C. Co. Ct.) the holding in **Preeper** was referred to but not followed. The court chose, instead, to follow the unreported case of **R. v. Doro** (1984, B.C. Co. Ct.) with the result that the accused was convicted of suspended driving subsequent to his conviction for driving without a valid driver's licence. The court held that the former charge had two necessary ingredients (suspension of driver's licence and knowledge of that suspension) that the latter did not require, and further that "there is a difference between an included offence and two causes or matters that might arise out of a single event" (p. 202). It was also held that such conviction did not offend s. 11(h) of the **Charter**.



It is easy for a suspended driver to say truthfully that he doesn't have his licence with him and, if the police computer is down or the police fail to check, receive a small fine for failing to surrender his licence (s. 33(1)). The **Preeper** holding would aid a defendant in such a fraud.

R. v. Preeper (1984), 28 M.V.R. 193 (B.C. Prov. Ct.)

R. v. Moody (1985), 33 M.V.R. 198 (B.C. Co. Ct.)

R. v. Doro (1984), 13 W.C.B. 65 (B.C. Co. Ct.)

The above cases were all decided before the Supreme Court of Canada decision in **R. v. Prince** (1986, S.C.C.), where Dickson C.J.C. for a unanimous court conducted an extensive review of the rule against multiple convictions and stated in part (at 48-49):

...the rule against multiple convictions in respect of the same cause, matter or delict is suspect to an expression of Parliamentary intent that more than one conviction be entered when offences overlap....the requirement of sufficient proximity between offences will only be satisfied if there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded by the **Kienapple** principle.

It is submitted that **Prince** supports the result reached in **Doro** and **Moody** and that **Preeper** is no longer good law. The offence of driving while suspended requires an additional element; namely, that the individual have had his licence (or right to obtain a licence) suspended. This result is further supportable on policy grounds. The requirement of a licence in order to drive allows a province to set general standards to regulate who may drive a vehicle. The purpose of s. 53 is to keep drivers who have previously breached laws governing the operation of motor vehicles off the roads.

R. v. Prince (1986), 30 C.C.C. (30) 35, 54 C.R. (3d) 97 (S.C.C.)

Charter Issues: In **R. v. Ross** (1985, B.C.S.C.), it was held that a mandatory three-year driving prohibition following from conviction is not cruel and unusual punishment within the meaning of s. 12 of the **Charter**, even where the defendant is a professional driver. Similarly, the mandatory six-month licence suspension that follows upon conviction for the offence in s. 53 was held in **R. v. Middlebrook** (1988, Ont. C.A.) not to violate s. 7 or s. 12 of the **Charter**.

R. v. Ross (1985), 32 M.V.R. 481 (B.C.S.C.)

R. v. Middlebrook, R. v. Miller, R. v. Laporta (1988), 5 M.V.R. (2d) 236 (Ont. C.A.)

**Where Person Suspended Does Not Hold Licence: s. 54**

An earlier version of this section was considered in **R. v. Kahl** (1971, Ont. H.C.) and **R. v. Perry** (1972, Ont. Co. Ct.). It was argued that the section could not apply where the suspension arose under a statute other than the **H.T.A.** (in both cases, the statute in question was the **Motor Vehicle Accident Claims Act**). The **H.T.A.** has subsequently been amended and now refers to "the provisions of an Act of the Legislature or a regulation made thereunder" instead of "the provisions of this Act"; accordingly, these cases no longer apply and s. 54 will apply to, for example, a suspension under s. 2(3) of the **Compulsory Automobile Insurance Act**.

The effect of the new section was considered by Killeen Co. Ct. J. in **Campbell v. R.** (1980, Ont. Co. Ct.). The court held (at 219-220):

In plain and unequivocal language this section provides for the deemed existence, viability or extension of life of an otherwise non-existent or expired licence...for all purposes of the Act.

The court declined to follow **R. v. Lindsay** (1979, Ont. H.C.) where the court purported to follow **R. v. Kahl** in the context of an **H.T.A.** suspension, and preferred instead the conclusion reached in **R. v. Grayley** (1979, Ont. Prov. Ct.).

*Campbell v. R.* (1980), 4 M.V.R. 214 (Ont. Co. Ct.)

*R. v. Lindsay* (unreported, Ont. H.C., Feb. 15, 1979, per Grange J.)

*R. v. Kahl* (1971), 4 C.C.C. (2d) 172 (Ont. H.C.)

*R. v. Grayley*, (unreported, Ont. Prov. Ct., June 21, 1979, per Carson P.C.J.)

*R. v. Perry* (1972), 6 C.C.C. (2d) 481 (Ont. Co. Ct.)

Motor Vehicle Accident Claims Act, R.S.O. 1970, c. 281

**Demerit Point System: s. 56**

The demerit point system is set out in O. Reg. 316/91. For the six-point demerit system that applies to probationary drivers, see O. Reg. 319/91, ss. 8-13,

In **R. v. Ghany** (1983, Ont. C.A.) the court considered the effect of a notice of suspension given under the regulation. On December 9, 1981, the respondent received a notice stating:

Your driver [sic] licence is suspended pursuant to the demerit point system, Regulation-Sec. 7(1)(a) O. Reg. 359/81 effective 21 December 1981 and shall not be reinstated until 30 days have elapsed from the date the licence is surrendered for the purposes of this subsection....



The trial judge held that the notice indicated that the licence was suspended at the time the notice was given and that, as s. 7(1) of O. Reg. 359/81 requires prior notice, there had not been a "valid suspension". The Court of Appeal reversed. It held that the notice was clear and unambiguous in indicating that the suspension did not take effect until December 21, 1981, so that notice was properly and effectively given of the suspension. The Court further held that "surrender" of a licence involves more than a mere assertion by the defendant that the licence was mailed to the Registrar and requires that the Registrar receive the licence.

R. v. Ghany (1983), 19 M.V.R. 169 (Ont. C.A.)

### **Requirements as to Tires: s. 69, 70**

In **R. v. Dodson** (1972, Ont. H.C.), a regulation prohibiting the use of studded tires at any time was held to be a valid exercise of power under the predecessor to s. 70(1)(e). Although it involved a complete prohibition rather than a prohibition limited to certain times of the year.

R. v. Dodson (1972), 9 C.C.C. (2d) 358 (Ont. H.C.)

### **Signs, Etc., Obstructing View: s. 73**

In **R. v. Lovett** (1986, N.B.Q.B.) the defendant was charged under the New Brunswick equivalent to s. 73(1) where the side and rear windows of his vehicle were tinted. Expert evidence at trial indicated that the tinting would make little difference to the driver's vision in broad daylight but would substantially affect it in twilight or at night. The court held (at 285):

Certainly the amount of visibility at the time the vehicle is operated is relevant to sustaining this charge. In other words, if a person who has a motor vehicle that is constructed in such a way that there would be an obstruction to view at night, it, in my view, is no offence to drive the vehicle in broad daylight unless there is evidence that such tinting in this case would obstruct the view in broad daylight.

If this reasoning is accepted, it would seem to apply to ss. 55(2) and 55(3) also.

R. v. Lovett (1986), 43 M.V.R. 282 (N.B.Q.B.)

**Unnecessary Noise: s. 75(4)**

The mere existence of unnecessary noise does not constitute an offence under the **H.T.A.** Similarly, it is not an offence for the driver to permit unnecessary noise. There must be some positive act by the driver that produces the noise.

R. v. Martin (1960), 126 C.C.C. 329 (Ont. H.C.)

**Radar Warning Device Prohibited: s. 79**

General: In **R. v. McNamara** (1985, Ont. Prov. Ct.), the offence in s. 79 was held to be an offence of absolute liability. There is no onus on the Crown to show knowledge that the radar warning device was in the vehicle, and lack of knowledge that the device was in the vehicle is not a defence.

R. v. McNamara (unreported, Ont. Prov. Ct. County of Middlesex, May 23, 1985, per Walker P.C.J.)

In **R. v. Shuler** (1983, Alta. C.A.) the court held that possession of a radar warning device that is functional, but for the absence of a fuse, is the mischief towards which the section is directed, and that the absence of a fuse will not prevent a conviction. The Alberta legislation referred to "a device *capable* of detecting or interfering with radar" [*italics added*], and it is doubtful whether the argument made by the defense in **Shuler** could be made in Ontario given the different wording of the legislation. In **Bloomfield v. Security National Insurance Company** (1983, Ont. Prov. Ct.), a civil case, it was held that possession of a radar warning device was illegal under s. 79 where the device as installed consisted of two parts that could be connected with a plug and the plug was not, in fact, connected.

R. v. Shuler (1983), 21 M.V.R. 189 (Alta. C.A.)

Bloomfield v. Security National Insurance Company, [1986] I.L.R. para. 1-2125 (Ont. Prov. Ct.)

In **R. v. Howe** (1988, Ont. Prov. Ct.), the court considered what would be "reasonable grounds" to believe that a vehicle was equipped with a radar warning device. The officer was operating a marked police cruiser without roof lights that could not be identified as a police vehicle by oncoming vehicles. He observed an oncoming vehicle that he believed was speeding, activated his radar unit, and obtained a reading of 103 km/h. After he obtained the reading, he observed the front of the car dip and believed that this was caused by the other car applying its brakes. He then obtained a second reading of 98 km/h. There was no evidence of anything on the road that would cause the oncoming car to brake. The court held that the officer had reasonable and probable grounds to believe that the vehicle contained a radar warning device.

R. v. Howe (unreported, Ont. Prov. Ct., County of Middlesex, October 27, 1988, per Walker P.C.J.)

It may in some cases be necessary to call expert evidence to prove that a device is "designed or intended for use in a motor vehicle to warn the driver of the presence of radar speed measuring equipment in the vicinity". In **R. v. Henuset** (1983, Man. Co. Ct.) a police officer seized and removed from a vehicle a two-piece device that he suspected was a radar warning detector. He reassembled it and made several tests in another vehicle, but could not swear that he had reassembled the device in the exact fashion in which it was found. The learned judge on appeal stated that he was highly suspicious and suggested that the defendant was probably guilty but was not satisfied beyond a reasonable doubt that the seized equipment was a radar warning device. However, this decision was disapproved in **R. v. Wasylyshen** (1987, Man. Q.B.) and may no longer represent the law.

R. v. Henuset (1983), 20 M.V.R. 1 (Man. Co. Ct.)

R. v. Wasylyshen (1987), 7 M.V.R. (2d) 273 (Man. Q.B.)

Constitutional Issues: In **R. v. Boivin** (1978, Ont. H.C.) the court considered whether the predecessor to s. 79 was valid provincial legislation. The court held that the legislation in pith and substance concerned the regulation of highway traffic, a matter of provincial jurisdiction, and the fact that it incidentally dealt with radio-communications did not render it *ultra vires* and therefore unconstitutional. A similar conclusion was reached in **R. v. Olin** (1978, Alta. Q.B.). **Boivin** and **Olin** were subsequently approved in **R. v. Grusko** (1981, Man. C.A.).

The court in **Boivin** further considered the argument that the legislation was rendered inoperative by s. 118 of the **Criminal Code** (now R.S.C. 1985, c. C-46, s. 129), which creates the offence of obstructing a police officer in the execution of his duty. The court held that even if there was an overlap between the two provisions there was no conflict or repugnancy, and therefore no bar to the two provisions operating concurrently.

R. v. Boivin (1978), 1 M.V.R. 44 (Ont. H.C.J.)

R. v. Olin (1978), 48 C.C.C. (2d) 248 (Alta. Q.B.)

R. v. Grusko (1981), 11 M.V.R. 239 (Man. C.A.), leave to appeal to S.C.C. refused (1981), 48 N.R. 446

It was held in **R. v. Mann** (1990, Nfld. S.C.), that provisions for automatic forfeiture of a radar warning device upon apprehension did not violate ss. 8 or 11(d) of the **Charter**.

R. v. Mann (1990), 23 M.V.R. (2d) 118 (Nfld. S.C.)

Attachments Required when Vehicle Drawn on Highway: s.80

A vehicle being towed by another vehicle is a "trailer" within the meaning of this section.

Maki v. Corcoran, [1953] O.W.N. 843 (H.C.)

**Safety Standards Certificates: s. 90**

Evidence of identification of a licensee authorized to issue safety standards certificates may be introduced by means of the certificate in question. The actual licence need not be formally produced.

R. v. Biluk (1980), 14 M.V.R. 53 (Ont. Prov. Ct.)

In **R. v. Servacar Ltd.** (1983, Ont. C.A.) the Ontario Court of Appeal considered the issue of the vicarious liability of the licensee for the failure of a motor vehicle inspection mechanic in his employ to inspect the vehicle properly. It was held that the Legislature had imposed a duty, on the licensee, to be satisfied that the *mechanic* found the vehicle to comply. The statutory duty was not broad enough to impose vicarious liability on the licensee. At the time Servacar Ltd. was charged, s. 90(3)(a) indicated that a safety standard certificate shall not be issued unless, "(a) the vehicle has been inspected by a motor vehicle inspection mechanic...and the vehicle *is found to comply....*" The italicized portion has since been amended to read "...and the vehicle *complies....*" It is submitted that the Legislature has clearly manifested an intention to impose liability for improper inspections on both parties signing the safety standard certificate. The standard of compliance is no longer the subjective opinion of the inspecting mechanic; it is an objective standard. The licensee is now directly liable for the actsof the mechanic conducting inspections under the authority of the licensee's licence (subject to the defences available to strict liability offences.

R. v. Biluk (1981), 14 M.V.R. 53 (Ont. Prov. Ct.)

R. v. Servacar Ltd. (1983), 25 M.V.R. 83, 1 O.A.C. 95 (Ont. C.A.)

**Motorcyclists to Wear Helmet: s. 104**

The corresponding offence under the British Columbia **Motor Vehicle Act** has been held to be one of strict liability.

R. v. Varga (1983), 24 M.V.R. 256 (B.C.S.C.)

The Alberta legislation has been held to be within the legislative competence of the province as being legislation for the regulation and licensing of traffic on highways within the province.



R. v. Jones, R. v. Shannon (1979), 6 M.V.R. 308 (Alta. Prov. Ct.)

In **R. v. Ciarnello** (1979, B.C. Prov. Ct.), the court considered the validity of a regulation which required safety helmets to conform with the standards of one of five standards associations. It held that the regulation was an unwarranted subdelegation of a legislative power, and was therefore *ultra vires*. The section was subsequently amended and was upheld on other grounds in **A-G. B.C. v. Craig** (1987, B.C.C.A). It should be noted that the British Columbia statute, unlike the Ontario **H.T.A.**, did not contain any provision specifically permitting adoption by reference of a safety code in a regulation.

R. v. Ciarnello (1979), 12 B.C.L.R. 394 (Prov. Ct.)

A-G. B.C. v. Craig (1987), 49 M.V.R. 191 (B.C.C.A.), rev'g (1986), 44 M.V.R. 222 (B.C.S.C.)

It has been held that compulsory helmet legislation does not contravene the right to security of the person guaranteed by s. 7 of the **Charter**. Evidence that helmets cause (1) heat build-up resulting in fatigue and loss of co-ordination; (2) loss of peripheral vision; and (3) loss or attenuation of hearing, thereby increasing the likelihood of accidents and injuries was held to be limited and tenuous and outweighed by evidence of increased safety to wearers. There was nothing to prohibit the Legislature from limiting the degree of individual risk-taking upon public highways; such legislation is not, therefore, discriminatory.

R. v. Fisher (1984), 29 M.V.R. 137 (Man. Prov. Ct), aff'd (1985), 38 M.V.R. 287, 23 C.C.C. (3d) 29 (Q.B.)

In **R. v. Houniet** (1985, B.C. Co. Ct) the British Columbia regulation governing the standards for safety helmets was held to violate s. 7 of the **Charter**. It is a principle of fundamental justice that a defendant must be able to determine the rules that apply to him, and at least one of the publications setting out the standards was not readily available. It should be noted that the British Columbia regulation was apparently conjunctive (unlike R.R.O. 1980, Reg. 482, which is clearly disjunctive) and contained no reference to stickers of approval. Arguably, the presence of one of the prescribed stickers on the helmet could give rise to a defence of due diligence in Ontario, even if the helmet did not comply with the standard.

R. v. Houniet (1985), 21 C.R.R. 175 (B.C. Co. Ct.)

### **Seatbelt Assembly: s. 106**

General: It should be noted that ss. 106(2)(3) and (6) do not just require that the seatbelt be worn, but that it be worn "in a properly adjusted and securely fastened manner". In **R. v. Merchant** (1990, Sask. Q.B.) it was held that the phrase "properly



adjusted" refers to the degree of snugness of the shoulder portion of the belt, and that there was no evidence that the belt was not "properly adjusted" where it was passed under the driver's armpit as opposed to over the shoulder. It is submitted that this holding is incorrect and should not be followed in Ontario, since its effect is surely to read the word "properly" out of the section. As a matter of practice, until this case is disapproved in Ontario, it is prudent to ask the police witness the proper way to wear a lap-shoulder belt.

R. v. Merchant (1990), 25 M.V.R. (2d) 234 (Sask. Q.B.)

In **R. v. Bixby** (1987, Nfld. S.C.T.D.) it was held that an exemption virtually identical to s. 106(5)(b) was unavailable unless the defendant actually had the certificate on his person at the time of the alleged offence. It is submitted that this interpretation of the section may lead to overly harsh results. The exemption should be available where a person has received a certificate prior to the date of the offence, even if he does not have it on his person at the time he was charged.

R. v. Bixby (1987), 7 M.V.R. (2d) 196 (Nfld. S.C.T.D.)

The court in **R. v. Matthews** (1987, Nfld. S.C.T.D) considered an exemption virtually identical in wording to s. 106(5)(c) of the Ontario **H.T.A.** It was held that the exemption does not apply to a person whose work often requires him to alight from and re-enter the vehicle at frequent intervals unless he is actually engaged in such work at the time of the alleged offence. The intent of the section was to avoid "unreasonable inconvenience" and that test was not met where the defendant was on a three-kilometre journey in the course of his business.

R. v. Matthews (1987), 70 Nfld. & P.E.I.R. 30 (Nfld. S.C.T.D.)

Charter: In **R. v. Thompson** (1986, B.C.C.A.) and **R. v. Settle** (1987, N.S. Co. Ct.) it was held that mandatory seatbelt legislation does not violate the freedom of conscience and religion guaranteed by s. 2(c) of the **Charter**.

R. v. Thompson (1986), 48 M.V.R. 158 (B.C.C.A. in chambers) aff'd (1986), 45 M.V.R. 136 (B.C.C.A.)

R. v. Settle (1987), 80 N.S.R. (2d) 274 (N.S. Co. Ct.)

In **Leger v. Montreal** (1986, Que. C.A.) the Quebec legislation providing for mandatory seatbelt use was held not to violate s. 7 of the **Charter**, and a similar result was reached in **R. v. Doucette** (1987, N.S.C.A.) and **R. v. MacIntyre** (1989, P.E.I. Prov. Ct.). In **R. v. Maier** (1987, Alta. Prov. Ct.), extensive expert evidence from both Crown and defence was heard at trial in support of a claim that mandatory seatbelt legislation violated s. 7 of the **Charter**. The Alberta Court of Appeal, in upholding the trial judge, stated (at 149):

In the present case, however, it is not shown that the seatbelt increases the wearer's risk of injury or death by whatever small amount. Indeed, the contrary is shown. The risk of injury or death is decreased when a seatbelt is worn; moreover, failure to wear a seatbelt puts other persons, both in the vehicle and outside it, at increased risk.

*Leger c. Montreal* (1985), 39 M.V.R. 60 (Que. S.C.) aff'd (1986), 48 M.V.R. 85 (Que. C.A.)

*R. v. Doucette* (1987), 48 M.V.R. 110 (N.S.C.A.), leave to appeal to S.C.C. denied Oct. 1, 1987

*R. v. MacIntyre* (1989), 22 M.V.R. (2d) 331 (P.E.I. Prov. Ct.)

*R. v. Maier* (1987), 83 A.R. 194 (Prov. Ct.), rev'd (1989), 13 M.V.R. (2d) 49 (Q.B.), rev'd (1989), 21 M.V.R. (2d) 134 (Alta. C.A.), leave to appeal to S.C.C. refused (1990), 107 N.R. 80.

In *R. v. Kennedy* (1987, B.C.C.A.), the court cited with approval *Leger*, *Doucette*, and *Thompson* in refusing the defendant leave to appeal on an argument that mandatory seatbelt laws violated s. 7 of the **Charter**. A further application for leave to appeal to the Supreme Court of Canada was dismissed.

*R. v. Kennedy* (1987), 3 M.V.R. (2d) 88 (B.C.C.A.) leave to appeal to S.C.C. refused (1988), 4 M.V.R. (2d) xxxviii

### **Width of Vehicle: s. 109**

In *R. v. Goacher* (1974, Ont. H.C.) it was held that the predecessor to the current s. 109(1) did not create an offence, even when read in conjunction with the predecessor to s. 109(15). It is not clear whether this case would still apply in light of subsequent amendments to the section, although *R. v. Elm Tree Nursing Home Inc.* (1987, Ont. C.A.) suggests that it might.

*R. v. Goacher* (1974), 18 C.C.C. (2d) 244 (Ont. H.C.)

*R. v. Elm Tree Nursing Home Inc.* (1987), 20 O.A.C. 277 (Ont. C.A.)

### **Load and Dimension Permits: s. 110**

The Crown must prove that the commercial vehicle stopped was in fact the commercial motor vehicle of which the defendant is alleged to be the owner, that is, the weighed vehicle was the same vehicle referred to in the registration permit. Failure to prove this essential element will result in a dismissal.

*George Radford Construction Ltd. v. R.* (1980), 6 M.V.R. 295 (Ont. Co. Ct.)

This section creates an offence of strict, rather than absolute, liability. A defence of due diligence is therefore available.

R. v Lafarge Canada Inc. (1989), 19 M.V.R. (2d) 110 (Ont. Prov. Ct.)

### **Loading of Motor Vehicle Etc.: s. 111(2)**

In **R. v. Dupont** (1986, Ont. Dist. Ct.) Kurisko D.C.J. carefully considered this subsection in light of the factors set out in **R. v. City of Sault Ste. Marie** (1977, S.C.C.) and held that it created an offence of strict, rather than absolute, liability. The same conclusion was reached in **R. v. Burge** (1988, P.E.I.S.C.).

R. v. Dupont (1986), 42 M.V.R. 138 (Ont. Dist. Ct.)

R. v. Burge (1988), 72 Nfld. & P.E.I.R. 158 (P.E.I.S.C.)

In **R. v. Bill Thompson Transport Ltd.** (1973, Ont. Prov. Ct.) the defendant was transporting an apparently sealed drum of creosote which sprang a leak, causing some of the creosote to leak out. This section was held not to apply since the drum itself was firmly and securely bound, sufficiently covered and secured and loaded. Given the wording of the section ("*...no portion of the load...*") the correctness of this decision may be doubted, although on the facts of the case a due diligence defence might have been available.

R. v. Bill Thompson Transport Ltd. (1973), 15 C.C.C. (2d) 574 (Ont. Prov. Ct.)

### **Weight: s. 114**

This section is within the legislative competence of a province. Although the Parliament of Canada has exclusive authority pursuant to s. 91(17), of the **Constitution Act, 1867** to enact legislation governing weights and measures, the provinces have exclusive authority to legislate in respect of vehicular weights.

R. v. J.W. Rehn Trucking (1981), 11 M.V.R. 315 (Alta. Q.B.)

In **R. v. Lucas** (1983, N.S.C.A.) the Nova Scotia Court of Appeal examined the abbreviated descriptions of various "overweight vehicle" offences as found in the regulations. Apparently these regulations indicated the wording "overweight vehicle" in relation to eight different offences, each of which were proscribed by the same section of the **Motor Vehicle Act**. The defendant faced two different charges, although the informations did not reveal which of the eight possible charges were being pursued by the Crown. It was held that the failure to provide the accused with notice of the specific offence violated his rights under s. 11(a) of the **Charter** to be so informed of the specific offence with which he was charged. As a result the charges were dismissed. Such a situation is unlikely to arise in respect of the overweight vehicle offences created by the **H.T.A.** (Ontario). The list of abbreviated wordings

suggested in **Regulation 817** of the **Provincial Offences Act** provides separate wordings and subsection numbers for each offence.

R. v. Lucas (1983), 6 C.C.C. (3d) 147, 21 M.V.R. 292. (N.S.C.A.)

### **Restrictions as to Weight on Tires: s. 115**

In **R. v. Mannion Transportation Ltd.** (1985, Sask. Q.B.), the offence of overweight on tires was held to be an offence of strict liability. The court pointed out that while the maximum weight of loads is regulated by statute, it is possible to obtain a permit to operate in excess of these, suggesting that what the legislation is attempting to do is to regulate loads rather than create an absolute prohibition. The Act clearly reflected the need for some flexibility, and the absence of an absolute standard would not jeopardize the public interest. In addition, the potential penalties were substantial.

R. v. Mannion Transportation Ltd. (1985) 31 M.V.R. 246 (Sask. Q.B.)

### **Maximum Allowable Axle Unit Weights: s. 116**

The classification of this offence is problematic. In **R. v. Allen** (1979, Ont. Dist. Ct.) sections 71 to 80 [now ss. 114-125] of the **Highway Traffic Act** were held to create offences of absolute, rather than strict, liability. It is respectfully submitted that this decision is wrongly decided. In analyzing the section, the court made no reference to **R. v. Chapin** (1979, S.C.C.), where the factors to be considered in determining whether an offence is one of strict or absolute liability are further developed. Other cases considering offences relating to vehicle weights have held them to be offences of strict liability (see the annotations to ss. 115 and 118).

Subsequently, in **Donline Haulage Inc. v. R.** (1980, Ont. Co. Ct.) it was held that this offence is one of strict liability, at least where the owner is charged pursuant to s. 147(1) [now 207(1)].

In **Allen**, it was suggested that defences of necessity and commercial impossibility may be applicable notwithstanding that the offence is one of absolute liability.

R. v. Allen (1979), 3 M.V.R. 203 (Ont. Dist. Ct.)

R. v. Chapin (1979), 45 C.C.C. (2d) 333, 10 C.R. (3d) 371 (S.C.C.)

Donline Haulage Inc. v. R. (1980), 4 M.V.R. 248 (Ont. Co. Ct.)

See generally "Strict and Absolute Liability" in **General Principles and Defences**, *supra*.



In **R. v. Boyle** (1987, B.C. Prov. Ct.) the offence of operating a vehicle with an overloaded axle was held to be a strict, rather than an absolute, liability offence. The court cited **R. v. Laidlaw Transport Ltd.** (1980, Ont. Co. Ct.), **R. v. Donline Haulage Inc.** and **R. v. Mannion** (1985, Sask. Q.B.) with approval, and declined to follow **R. v. Allen**.

*R. v. Boyle* (1987), 4 M.V.R. (2d) 113 (B.C. Prov. Ct.), *aff'd ibid* (B.C. Co. Ct.)

*R. v. Laidlaw Transport Ltd.* (1980), 4 M.V.R. 253 (Ont. Co. Ct.)

*R. v. Mannion Transportation Ltd.* (1985), 31 M.V.R. 246 (Sask. Q.B.)

### **Maximum Allowable Gross Vehicle Weights: s. 118**

The case of **R. v. Laidlaw Transport Ltd.** (1980, Ont. Co. Ct.) held after a meticulous application of a "**Sault Ste. Marie** analysis" that this offence is one of strict liability. A defence of "exercising all reasonable care" (due diligence) is available.

*R. v. Laidlaw Transport Ltd.* (1980), 4 M.V.R. 253 (Ont. Co. Ct.)

See also *Spacemaker Products Ltd. v. R.* (1980), 7 M.V.R. 485 (Ont. Co. Ct.)

### **Power of Officer to Have Load Weighed: s. 124**

The corresponding New Brunswick provisions regarding weighing have been held not to specify who decided whether stationary or portable scales were to be used. As a result the refusal by the defendant to permit use of portable scales, as he was concerned with possible damage to his vehicle, was held not to violate the Act.

*R. v. Morabito* (1980), 32 N.B.R. (2d) 590, 78 A.P.R. 590 (N.B.Q.B.)

### **Penalty: s. 125**

The words "and on conviction is liable to a fine of" are ambiguous as to whether the legislature intended to fix mandatory or maximum penalties. Such ambiguity is resolved in favour of the defendant and the fines so listed are to be considered maximum fines except for the minimum fine of \$50 in 125(a).

*Spacemaker Products Ltd. v. R.* (1980), 7 M.V.R. 485 (Ont. Co. Ct.)

### **Rate of Speed: s. 128**

Classification of Offence: It has been held in several jurisdictions, including Newfoundland (**R. v. King**), Nova Scotia (**R. v. Naugler**, **R. v. Surette**), Quebec (**R. v. Lemieux**) and British Columbia (**R. v. Harper**), that speeding is an offence of absolute liability within the threefold classification of **R. v. City of Sault Ste Marie**, so that the defences of due diligence and honest and reasonable mistake of fact are not available.



- R. v. King (1984), 54 Nfld. & P.E.I.R. 286 (Nfld. Dist. C.)  
R. v. Naugler (1981), 14 M.V.R. 9 (N.S.S.C.A.D.)  
R. v. Surette (1981), 50 N.S.R. (2d) 588 (N.S.S.C.A.D.)  
R. v. Harper (1985), 35 M.V.R. 134 (B.C.Co.Ct.), aff'd (1986), 44 M.V.R. 313 (C.A.)  
R. v. Lemieux (1978), 48 C.C.C. (2d) 33 (Que. C.A.)

The leading decision in Ontario is **R. v. Hickey**, (1976, Ont. C.A.), where the court held that speeding was an offence of absolute liability and reasonable mistake of fact would not be a defence.

- R. v. Hickey (1976), 30 C.C.C. (2d) 486 (Ont. C.A.)

In particular, it is clear that reliance on a defective speedometer is not a defence to a charge of speeding, even if that reliance is reasonable.

- R. v. Hickey (1976), 30 C.C.C. (2d) 486 (Ont. C.A.)  
R. v. King (1984), 14 M.V.R. 9 (N.S.S.C.A.D.)  
R. v. Naugler (1981), 14 M.V.R. 9 (N.S.S.C.A.D.)  
R. v. Lemieux (1978), 48 C.C.C. (2d) 33 (Que. C.A.)  
R. v. Harper (1985), 35 M.V.R. 134 (B.C. Co. Ct.), aff'd (1986), 44 M.V.R. 313 (C.A.)

**Proof of Speed Limit:** In order to prove the offence, it will be necessary to prove the speed limit. For this reason, it is good practice always to lead evidence of the precise location where the speeding occurred.

As an examination of s. 128 shows, rates of speed may be prescribed by statute, by regulation, by bylaw and signs, or in the case of construction zones, by designation and signs.

Where the speed limit is statutory, it will be necessary to establish the features that determine which statutory limit applies. Where there is an absence of evidence on this point, the issue will be how far the court may take judicial notice. In **R. v. Eagles** (1976, Ont. C.A.) it was held that as a general proposition the boundaries of a municipality would not be sufficiently notorious that judicial notice could be taken. It should be noted, however, that the case apparently involved a situation where the speeding took place close to the municipal boundary. It is not clear whether the court would have reached the same result if the offence had occurred, for example, at the corner of Yonge Street and Bloor Street and the issue was whether the offence had taken place within Metropolitan Toronto. **Eagles** should be compared with **R. v. Redlick** (1978, Ont. H.C.) where the issue was whether judicial notice could be taken that a particular location was within a city, town, police village or other built-up area. Linden J. held (at 359-360):

Normally this would require evidence, especially if there is a dispute as to this matter, but I do not believe that evidence must be given in all

cases, especially where it is so obvious to everyone that the offence has occurred within such an area. One should not be required to prove the patently obvious. It is only where there is some dispute or possible disagreement about whether the location is within such an area or whether it is not....It is not necessary to waste the time of the Court proving the obvious. If the location is in dispute, it can be drawn to the attention of the Court, and evidence can be demanded concerning the fact.

The reasoning and result in **R. v. Redlick** were subsequently implicitly approved in **R. v. Potts** (1982, Ont. C.A.), where the court saw no inconsistency between that case and **R. v. Eagles**.

**R. v. Eagles** (1976), 31 C.C.C. (2d) 487 (Ont. C.A.)

**R. v. Redlick** (1978), 48 C.C.C. (2d) 358, 2 C.R. (3d) 380 (Ont. H.C.J.)

**R. v. Potts** (1982), 66 C.C.C. (2d) 219 (Ont. C.A.)

It was held in **R. v. Bland** (1974, Ont. C.A.) that where the speed limit for a particular location is prescribed by regulation, the court is not only entitled but obliged to take judicial notice of the speed limit at that location.

**R. v. Bland** (1974), 20 C.C.C. (2d) 332 (Ont. C.A.)

Where the speed limit is set by bylaw, the issue arises whether the Crown is required to prove the bylaw. A court generally will not take judicial notice of bylaws. However, it appears from **R. v. Clark** (1974, Ont. C.A.) and **R. v. McLaren** (1981, Ont. C.A.) that while it is necessary for the Crown to prove the existence of a bylaw setting a speed limit, the evidentiary burden may be satisfied by inference from evidence of the existence of signs used to designate a speed limit set by a bylaw. Further, it appears from the evidence given at trial in **R. v. McLaren** (reproduced in the headnote) that the typical evidence of a police officer that "the area is a posted 50 km/h zone" is sufficient to meet this burden.

**R. v. Clark** (1974), 18 C.C.C. (2d) 52 (Ont. C.A.)

**R. v. McLaren** (1981), 10 M.V.R. 42 (Ont. C.A.)

Where a speed limit is set by bylaw, there is an additional requirement that the bylaw does not become effective until signed in accordance with the Act and regulations: see s. 128(11). Presumably the principles of substantial compliance and *prima facie* regularity will apply here as long as there is some evidence that signs were in fact posted: See "Disobey Sign: s. 182".

Where a stretch of highway is signed as required, it is no defence if a driver has come onto the highway and does not pass a sign before he is charged with speeding.

R. v. Snodgrass (1980), 32 N.B.R. (2d) 583 (N.B.Q.B.)

Description of Speed: In **Giffin v. R.** (1980, N.S. Co. Ct.), O'Hearn Co. Ct. J. held that evidence that the vehicle was travelling "at 107 kilometres" (rather than "at 107 kilometres per hour") was sufficient as an expression of speed rather than distance when taken in the context of the entire evidence.

Giffin v. R. (1980), 8 M.V.R. 313 (N.S. Co.Ct.)

Radar Speed Measuring Device: If the proper evidentiary foundation is laid, the reading obtained by a radar speed measuring device ("radar device") will be *prima facie* evidence of the speed of a vehicle. Some issues which arise in establishing such an evidentiary foundation are discussed below.

Radar: Judicial Notice of Operation: In **R. v. Waschuk** (1970, Sask. Q.B.), the court held that it was an error to take judicial notice of the significance of various tests conducted on a radar device and the correctness of the reading obtained by the device, where there was no evidence as to the meaning of the test results, the qualifications of the operator, or the accuracy of the machine other than the test results themselves. The court applied the test of "facts which are known to intelligent persons generally", and did not consider whether judicial notice could appropriately be taken of the purpose of radar devices or their general use.

In **Giffin v. R.**, (1980, N.S. Co. Ct.) O'Hearn, Co. Ct. J. held that the fact that the purpose of radar devices was to measure and control the speed of traffic on the highway, although not their exact functioning, came within "that knowledge of common affairs of life which men of ordinary intelligence possess", and was an appropriate subject for judicial notice.

R. v. Waschuk (1970), 1 C.C.C. (2d) 463 (Sask. Q.B.)

Giffin v. R. (1980), 8 M.V.R. 313 (N.S. Co. Ct.)

Radar: Qualifications of Operator: It is clear that the operator of the radar device must be qualified in its use and operation. What is less clear is precisely what evidence is needed to establish this. It should be noted that in Ontario, at least, there is no designation by statute or regulation of "qualified radar operator", although training and qualification is apparently done by the Ontario Police College and by individual forces.



In **R. v. Wolfe**, (1979, B.C. Co. Ct.) the defendant's appeal was allowed where the officer, while trained in the use of radar, had not been trained on the particular model that he was using and was unsure of the proper method of testing the device.

In **R. v. O'Reilly** (1979, Alta. Dist. Ct.), the court cited with approval a passage from the unreported decision in **R. v. Jacobs** (Alta. Prov. Ct.) which stated:

The instrument must be operated by someone trained in its operation. He need not have knowledge of the electronics or mechanism of the device but must be thoroughly familiar with its use.

This passage was in turn cited with approval in **R. v. Werenka** (1981, Alta. Q.B.) and **R. v. Bourque** (1985, Alta. Q.B.). It is submitted that (with the possible exception of the qualifier "thoroughly") it accurately states the law on this point, notwithstanding the disapproval of this line of cases on other grounds (see "Radar: Certificate of Accuracy of Tuning Forks" and "Radar: Unit Capable of Accurately Measuring Speeds", *infra*).

In **R. v. Hallett** (1988, N.S. Co. Ct.), the officer had testified at trial that he was qualified to operate the radar unit and described the procedures he had carried out in order to use and test the unit. The court held that it was not necessary to prove in any formal way the qualifications of the operator, since his evidence was not expert evidence but simply involved matters of credibility and fact. It was held that there was sufficient evidence before the court to support the conviction.

The Ontario Court of Appeal appears to have adopted the same view that it is not necessary to prove any formal qualifications. Rather, the operator's qualifications, training and experience are matters to be considered in weighing the evidence as a whole. In **R. v. Bigioni** (1988, Ont. C.A.), the officer at trial had stated that "I am qualified in the use of radar", with no further evidence of his training or experience. The Court of Appeal held that evidence that the radar device was tested and was found to be operating accurately before and after the reading was obtained on the defendant's vehicle, together with the statement that the operator was qualified, was sufficient to establish a *prima facie* case. The case does not, however, go so far as to require that the officer in every case must state that he is a "qualified radar operator". In **R. v. Sim** (1988, Ont. C.A.), decided subsequent to **Bigioni**, the officer's testimony clearly indicated some familiarity with the unit but he did not state that he was a "qualified radar operator". The defence argument that it must be established that the operator of the radar unit is trained and qualified was rejected at trial. A subsequent appeal to the Court of Appeal was rejected. The court stated in a brief endorsement:

There was evidence of the police officer that he tested the radar unit both before and after it measured the respondent's speed and there was evidence from which it can be concluded that the police officer was familiar with the unit and the manner in which it was intended to be used. We accordingly cannot find any error of law on the part of the justice of the peace. The appeal will be dismissed.

The conclusion to be drawn from these cases seems to be that the training and qualifications of the operator are matters to be considered in weighing the evidence, but there is no requirement that the Crown establish that the officer is "qualified" in any technical sense. The term "qualified radar operator" is not a term of art, but is rather a matter to be determined from the officer's training and experience.

R. v. Wolfe (1979), 3 M.V.R. 143 (B.C.Co.Ct.)

R. v. O'Reilly (1979), 3 M.V.R. 228 (Alta Dist. Ct.)

R. v. Jacobs, unreported, Alta. Prov. Ct.

R. v. Bourque (1985), 38 M.V.R. 110 (Alta. Q.B.), rev'd on other grounds April 16, 1986 (Alta. C.A.)

R. v. Werenka (1981), 11 M.V.R. 280 (Alta.Q.B.)

R. v. Hallett (1988), 8 M.V.R. (2d) 29 ( N.S.Co.Ct.)

R. v. Bigioni, (unreported, Ont. C.A., Sept. 28, 1988, per Brooke, Krever and Griffiths J.J.A.)

R. v. Sim, (unreported, Ont. C.A., Oct. 11, 1988, per Robins, Tarnopolsky and Finlayson JJ.A.)

It is a question of fact whether an officer is a "qualified radar operator".

R. v. Cotter (unreported, Ont. Ct. (Prov. Div.)), leave to appeal to Ont. C.A. refused February 14, 1991 per Lacourciere J.A.

**Radar: Testing of Radar Device:** In **R. v. Lehane** (1982, Alta. Q.B.), following **R. v. O'Reilly** (1979, Alta. Dist. Ct.), it was held that evidence that the radar device had been tested and was operating properly was necessary for a conviction, and that in the absence of such evidence a conviction would be quashed even if there was no indication that the device was not operating properly. However, the decision implies that testing at the beginning and end of the police officer's shift would be sufficient.

In both **R. v. Sim** (1988, Ont. C.A.) and **R. v. Bigioni** (1988, Ont. C.A.), the Court in holding that a *prima facie* case had been established referred to the fact that the radar units had been tested both before and after the reading on the defendant's vehicle had been obtained. It is not clear from these decisions, however, whether tests before and after are prerequisites of a *prima facie* case, or whether the tests need to be conducted immediately after each vehicle (as opposed to being conducted at some point during the shift).



In **R. v. Furlong** (1985, Ont. Prov. Ct.), a defendant's appeal was allowed where there was no evidence that the tests were conducted by a qualified radar operator.

Although the authorities are somewhat conflicting, it appears that it is not necessary that evidence be given that the tests conducted were the approved tests for the radar device, at least in order to establish a *prima facie* case. In **R. v. O'Reilly** (1979, Alta. Dist. Ct.) this was stated to be required, and in **R. v. Windrem** (1986, Ont. Prov. Ct.) an appeal was allowed on this ground (although it should be noted that there the defendant had testified). However, in **R. v. Bigioni** (1988, Ont. C.A.) it was held that a *prima facie* case had been made out where no evidence that the tests were the manufacturer's approved tests had been given. The issue was specifically raised before the court at trial.

R. v. Lehane (1982), 15 M.V.R. 160 (Alta. Q.B.)

R. v. O'Reilly (1979), 3 M.V.R. 228 (Alta. Dist. Ct.)

R. v. Sim (unreported, Ont. C.A., Sept. 28, 1988, per Brooke, Krever and Griffiths JJ.A.)

R. v. Bigioni (unreported, Ont. C.A., Oct. 11, 1988, per Robins, Tarnopolsky and Finlayson JJ.A.)

R. v. Furlong, (unreported, Ontario Prov. Ct., Judicial District of Simcoe, Oct. 24, 1985, per Palmer P.C.J.)

R. v. Windrem, (unreported, Ont. Prov. Ct., Judicial District of Peel, May 27, 1985, per August P.C.J.)

Radar: Certificate of Accuracy of Tuning Forks: In **R. v. Bourque** (1985, Alta. Q.B.), the Alberta Court of Queen's Bench held that proof of the accuracy of the tuning forks, in the form of a certificate of accuracy, was necessary where such tuning forks are used to test the radar set. This view was rejected in **R. v. Owosu** (1986, Ont. Prov. Ct.) and in **R. v. Howe** (1986, Ont. Prov. Ct.), where the court stated (at 2-3):

I'm not suggesting that tuning forks don't over a period of time have some alteration in their resonance, but clearly the alteration in their resonance, when you are using two tuning forks, would at some time show up, in the result being tested for in the machine intended to be used. I think that the standard, or test or requirement of a certificate as to the accuracy of the tuning fork, as suggested [in **Bourque**] by Mr. Justice Mochanski [sic] is unreasonable and is not necessary. I think it's sufficient for a police officer who says he has training on the particular machine, that he has used a tuning fork to test it, especially two tuning forks and has found the machine to be working for both of them, for it to be concluded by the court that the radar device which he was thereafter using was in proper working order and to come to that conclusion beyond a reasonable doubt.

It should be noted that **R. v. Bourque** was overturned on appeal and no longer represents the law in Alberta or elsewhere.

*R. v. Bourque* (1985), 38 M.V.R. 110 (Alta. Q.B.), reversed April 16, 1986 (unreported, Alta. C.A., noted in Index to Vols. 1-15, M.V.R. (2d) at xxx)

*R. v. Owosu*, (unreported, Ont. Prov. Court, Judicial District of York, August 18, 1986, per Babe P.C.J.)

*R. v. Howe*, (unreported, Ont. Prov. Court, Judicial District of Middlesex, October 27, 1988, per Walker P.C.J.)

**Radar: Unit Capable of Accurately Measuring Speeds:** The issue here is not whether the unit is operating properly (i.e. that it has been tested and found to be functioning correctly) or what the purpose of the unit is, but whether the Crown is required to establish that a radar device, when tested and found to be operating properly, is capable of accurately measuring the speed of a motor vehicle.

In **R. v. O'Reilly** (1979, Alta. Dist. Ct.), the Alberta District Court approved an unreported Provincial Court decision, **R. v. Jacobs**, holding that the court must be satisfied that the radar unit was capable of accurately registering speeds. This decision was followed in **R. v. Werenka** (1981, Alta. Q.B.) and was specifically approved in **R. v. Bourque** (1985, Alta. Q.B.). As **Bourque** was overruled by the Alberta Court of Appeal, this line of cases is no longer good law. While the Alberta Court of Appeal did not give reasons for overruling the decision of the Court of Queen's Bench, the Court of Queen's Bench had allowed the defendant's appeal on two separate grounds, one of which was this point. In order to allow the appeal, the Court of Appeal had to reject both grounds accepted by the Court of Queen's Bench.

In **R. v. Grainger** (1958, Ont. C.A.), the defence argued that the information supplied by the radar device amounted to nothing unless it was proved that the device, when properly used, was capable of accurately measuring the speed of a motor vehicle on the highway. The court dismissed the defendant's appeal; however, it is not clear whether this was done on the basis of the testimony that the device had been tested and shown to be in good working condition and was properly used, or on the basis of the officer's testimony that the data furnished by the machine was "extremely accurate" (although there is no indication of how the officer could know this). **Grainger** was recently considered in **R. v. Redmond** (1990, Ont. C.A.), dealing with the admissibility of results of instruments used to measure blood-alcohol content.

The court in **Redmond** held that the law regarding the admissibility of measurements derived from scientific instruments by experts trained in their use, as set out in **Grainger**, required the following (at 10):

...it [is] not necessary for scientific evidence to be given to explain precisely how the machine operated or to prove its capability and accuracy. It is sufficient if the expert operating the machine establishes

that the machine is capable of making required measurements or producing the required data; that the machine was in good working order at the required time; and that it was properly used. If these conditions are met, the evidence is admissible and the only question left to the trier of fact is the weight to be given to such evidence.

A series of Ontario cases predating **Redmond** considered whether evidence that radar devices are capable of accurately measuring the speed of a motor vehicle is necessary. In **R. v. Meyer** (1984, Ont. Prov. Ct.), the court held that it was essential for the Crown to lead evidence from the radar operator that the radar device was capable of measuring the speed of a vehicle across the full range of the set. This position was rejected in **R. v. Kilcup** (1987, Ont. Prov. Ct.). The court pointed out that unless the officer was an expert in radar itself (as opposed to being qualified in its operation) such a statement would require opinion evidence that the officer would not be qualified to give. Subsequently, in both **R. v. Bigioni** (1988, Ont. C.A.) and **R. v. Sim** (1988, Ont. C.A.) it was argued by the defendants that the Crown was required to lead evidence that the radar device was capable of accurately measuring speeds in order to establish a *prima facie* case. The Court of Appeal rejected both appeals, stating in a brief endorsement in **Sim**:

There was evidence of the police officer that he tested the radar unit both before and after it measured the [defendant's] speed and there was evidence from which it can be concluded that the police officer was familiar with the unit and the manner in which it was intended to be used. We accordingly cannot find any error in law on the part of the justice of the peace. The appeal will be dismissed.

It is submitted that on the basis of the principles set out in **Redmond** and the requirements of a *prima facie* case as set out in **Bigioni** and **Sim**, the Crown is not required to establish (at least in the absence of evidence to the contrary) that a radar set, when found to be working accurately and when properly used, is capable of accurately measuring the speed of motor vehicles.

**R. v. O'Reilly** (1979), 3 M.V.R. 228 (Alta. Dist. Ct.)

**R. v. Jacobs**, unreported, Alta. Prov. Ct.

**R. v. Werenka** (1981), 11 M.V.R. 280 (Alta. Q.B.)

**R. v. Bourque** (1985), 38 M.V.R. 110 (Alta. Q.B.), reversed April 16, 1986 (unreported, Alta. C.A., noted in Index to Vols. 1-15, M.V.R. (2d), at xxx)

**R. v. Grainger** (1958), 120 C.C.C. 321 (Ont. C.A.)

**R. v. Redmond** (1990), 54 C.C.C. (3d) 273, 21 M.V.R. (2d) 1 (Ont. C.A.)

**R. v. Meyer**, (unreported, Ont. Prov. Ct., Judicial District of York Region, Aug. 23, 1984, per Zimmerman P.C.J.)

**R. v. Kilcup**, (unreported, Ont. Prov. Ct., Judicial District of Ottawa-Carleton, Sept. 8, 1984, per Hutton P.C.J.).



It is clear a defendant has no defence where he misreads a speed limit sign: see **R. v. Cunningham** (1979, Ont. Div. Ct.). Whether such a mistake is correctly classified as a mistake of fact or a mistake of law is less clear, although the issue remains academic while speeding is classified as an offence of absolute liability.

R. v. Parsons (1981), 11 M.V.R. 39 (N.S. Co. Ct.)

R. v. Kennedy (1972), 7 C.C.C. (2d) 42 (N.S. Co. Ct.)

R. v. Paul (1973), 12 C.C.C. (2d) 497 (N.S. Co. Ct.)

R. v. Perka, [1984] 2 S.C.R. 233, 14 C.C.C. (3d) 385

R. v. Cunningham (1979), 45 C.C.C. (2d) 544, 1 M.V.R. 223 (Ont. Div. Ct.)

See the discussion of the various defences in "General Principles and Defences", *supra*.

### Careless Driving: s. 130

Much of the confusion surrounding the offence of careless driving comes from a failure to distinguish the *actus reus* from whatever mental element must be shown. In Ontario, it is submitted (a) the offence requires only inadvertent, as opposed to advertent, negligence, (b) the offence is one of strict liability, (c) the conduct that must be shown is a departure from the conduct of a reasonable person sufficient to constitute a breach of duty to the public and deserve punishment. These different aspects are discussed below.

Advertence/Inadvertence and Classification: The issue of inadvertence was discussed in **O'Grady v. Sparling** (S.C.C., 1960) and **Mann v. R.** (S.C.C., 1966), where the court examined the validity of the Manitoba offences of careless driving in light of the **Criminal Code** sections pertaining to criminal negligence and dangerous driving respectively. In both decisions the **Criminal Code** sections were held to be concerned exclusively with advertent negligence while the careless driving provisions dealt with inadvertent negligence.

It is submitted that the meaning of inadvertent negligence is correctly set out in Glanville Williams' **Textbook of Criminal Law**, 2nd ed. (London: Stevens, 1983) at 88:

Negligence, then, is failure to conform to the standard of care to which it is the defendant's duty to conform. It is the failure to behave like a reasonable or prudent man, in circumstances where the law requires such reasonable or prudent behaviour....If he did not advert to the danger, or in other words realize there was a risk, when he ought to have, he is inadvertently negligent. Negligence means forbidden conduct where the defendant's liability depends on the fact that he failed to realize (foresee/know) what he ought to have realized, and failed to

conform his conduct accordingly, or, *a fortiori*, that he did realize it and yet failed to conform his conduct as he should.

(See also Cartwright J., dissenting on other grounds, in **O'Grady v. Sparling**, at 817.) The significant difference between inadvertent and advertent negligence is that the Crown is not required to show any mental element on the part of the defendant. It is the defendant's conduct that establishes the offence.

It is submitted that **R. v. Divizio** (1986, Ont. Dist. Ct.) is wrongly decided to the extent that it holds that the Crown is required to go further and establish some mental element. The court in **Divizio** notes that **R. v. Beauchamp** (1953, Ont. C.A.) and **R. v. Wilson** (1970, Ont. C.A.) both hold that inadvertent negligence may not in itself be sufficient to establish careless driving. While this is correct, the assumption that the added element that must be established is some mental element is wrong. Both **Beauchamp** and **Wilson** deal with the standard of conduct that driving must be measured against, and not the mental element of the driver (see "The Test or Standard of Conduct", below). It is this standard of conduct going beyond mere negligence that must be shown. The view that **Divizio** is incorrect in suggesting that some mental element need be established by the Crown is also supported by **R. v. Globocki** (1991, Ont. Prov. Div.)

The fact that careless driving involves inadvertent negligence does not make the defendant's mental state irrelevant, but merely removes it from being a necessary part of the Crown's case. The defendant's mental state may be relevant as a defence. In **R. v. McIver** (1965, Ont. C.A.) four justices held that careless driving permitted a defence of honest and reasonable mistake of fact and was therefore a "strict liability" offence as that term is used in **R. v. City of Sault Ste. Marie** (1976, S.C.C.). **McIver** was subsequently cited with apparent approval in **Sault Ste. Marie**, and a similar conclusion was reached in **R. v. Johnson** (1983, N.B.Q.B.). In light of these cases, it is submitted that **R. v. Lucki** (1955, Sask. Mag. Ct.), which held careless driving to be an offence requiring *mens rea*, is not good law.

O'Grady v. Sparling, [1960] S.C.R. 84, 33 C.R. 293

Mann v. R., [1966] S.C.R. 238, [1966] 2 C.C.C. 273, 47 C.R. 400

R. v. Divizio (1986), 32 C.C.C. (3d) 239 (Ont. Dist. Ct.)

R. v. Beauchamp (1953), 16 C.R. 270 (Ont. C.A.)

R. v. Wilson (1971), 1 C.C.C. (2d) 466 (Ont. C.A.)

R. v. Globocki (1991), 48 M.V.R. (2d) 179 (Ont. Prov. Div.)

R. v. McIver, [1965] 4 C.C.C. 182 (Ont. C.A.) aff'd on other grounds [1966] S.C.R. 254

R. v. City of Sault Ste. Marie (1976), 40 C.C.C. (2d) 353 (S.C.C.)

R. v. Johnson (1983), 45 N.B.R. (2d) 371 (N.B.Q.B.)

R. v. Lucki (1955), 17 W.W.R. 446 (Sask. Mag. Ct.)



The Test or Standard of Conduct: In **R. v. Beauchamp** (1953, Ont. C.A.), the leading Ontario case on the standard of conduct, the court stated (at 432):

...the test, where an accident has occurred, is not whether, if the accused had used greater care or skill, the accident would not have happened. It is whether it is proved beyond reasonable doubt that the accused, in the light of existing circumstances of which he was aware or of which a driver exercising ordinary care should have been aware, failed to use the care and attention or to give to other persons using the highway the consideration that a driver of ordinary care would have used or given in the circumstances? The use of the term "due care", which means care owing in the circumstances, makes it quite clear that, while the legal standard of care remains the same in the sense that it is what the average careful man would do in like circumstances, the factual standard is a constantly shifting one, depending upon road, visibility, weather conditions, traffic conditions that may reasonably be expected, and any other conditions that ordinary prudent drivers would take into consideration. It is a question of fact, depending upon the circumstances in each case.

The court went on to state (at 432-33):

There is a further important element that must be considered, namely, that the conduct must be of such a nature that it can be considered a breach of duty to the public and deserving of punishment. This further step must be taken even if it is so found that the conduct of the accused falls below the standard set out in the preceding paragraphs.

This second element was disapproved in **R. v. Jacobsen** (1964, B.C.C.A.), where the court cited the holding of Judson J. in **O'Grady v. Sparling** (1960, S.C.C.) that there cannot be degrees of inadvertence. It is submitted that while the B.C. Court of Appeal is correct in holding that inadvertence is not susceptible to degrees, the test or standard of conduct (and departure from it) is a matter of degree and there is no inconsistency in principle between **Beauchamp** and **O'Grady v. Sparling**. Nevertheless, **Jacobsen** continues to represent the law in British Columbia: see, e.g., **McDorman v. R.** (1984, B.C. Co. Ct.); **Vandale v. R.** (1983, B.C. Co. Ct.); **R. v. Weedon** (1987, B.C. Co. Ct.). **Beauchamp** has also been disapproved in Alberta in **R. v. Brown** (1986, Alta. Q.B.) and distinguished in Nova Scotia on the basis of the wording of the section: **R. v. Gooding** (1977, N.S. Co. Ct.).

**R. v. Beauchamp** (1953), 16 C.R. 270 (Ont. C.A.)

**R. v. Jacobsen** (1964), 22 C.R. 24, 48 W.W.R. 272 (B.C.C.A.)

**O'Grady v. Sparling**, [1960] S.C.R. 84, 33 C.R. 293

McDorman v. R. (1983), 23 M.V.R. 165 (B.C. Prov. Ct.) aff'd (1984), 27 M.V.R. 37, (B.C. Co. Ct.)

Vandale v. R. (1989), 22 M.V.R. (2d) 288 (B.C. Co. Ct.)

R. v. Weedon (1987), 7 M.V.R. (2d) 21 (B.C. Co. Ct.)

R. v. Brown (1986), 71 A.R. 137 (Q.B.)

R. v. Gooding (1977), 33 N.S.R. (2d) 98, 57 A.P.R. (2d) 98 (N.S. Co. Ct.)

Despite this disapproval, it is submitted that **Beauchamp** still represents the law in Ontario. It was cited with approval in **R. v. Yolles** (1959, Ont. C.A.) and more recently in **R. v. Divizio** (1986, Ont. Dist. Ct.) and **R. v. Globocki** (1991, Ont. Prov. Div.) It is at least consistent with, if not specifically approved in, the brief and rather vague reasons in **R. v. Wilson** (1970, Ont. C.A.). It should be noted that MacKay J.A., who delivered the judgment in **Beauchamp**, was a member of the panel in **Wilson**.

R. v. Beauchamp (1953), 16 C.R. 270 (Ont. C.A.)

R. v. Yolles, [1959] O.R. 206, 30 C.R. 93 (C.A.)

R. v. Divizio (1986), 32 C.C.C. (3d) 239, 1 M.V.R. (2d) 248 (Ont. Dist. Ct.)

R. v. Globocki (1991), 48 M.V.R. (2d) 179 (Ont. Prov. Ct.)

R. v. Wilson, [1971] 1 O.R. 349, 1 C.C.C. (2d) 466 (C.A.)

Where an accident has occurred, the fact that serious injury or death has resulted is not (except in unusual cases) relevant to an assessment of whether the departure from the standard of care would justify a finding of careless driving.

R. v. Globocki (1991), 48 M.V.R. (2d) 179 (Ont. Prov. Ct.)

One Offence Or Two: In **Archer v. R.** (1955, S.C.C.), s. 29(1) of the Ontario **Highway Traffic Act**, R.S.O. 1950, which read "every person who drives a vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway shall be guilty of an offence" was held to create two offences. The section was subsequently re-enacted in its current form. Subsequently, in **MacKenzie v. R.** (1956, Ont. H.C.) it was held that the new version creates one offence that may be committed in either of two ways.

**MacKenzie** dealt with an information that charged that the defendant "did unlawfully drive...without due care and attention". A series of cases in Alberta have considered the validity of an information charging that the defendant did commit the offence of "careless driving", without specifying the head relied on. In **R. v. Gulyas** (1963, Alta. Dist. Ct.) the court held that the Alberta legislation, which is substantially the same as the amended Ontario legislation, created two offences, and so a charge in the words of the section would be duplicitous. An appeal was dismissed on other

grounds. **MacKenzie**, rather than **Gulyas**, was followed in **R. v. Wing** (1962, Alta. Dist. Ct.), but **Gulyas** was reaffirmed, without mention of **Wing**, in **R. v. Horwitz** (1963, Alta. Dist. Ct.).

It should be noted that by s. 13 of the **Provincial Offences Act**, "careless driving" is an approved short-form description of the offence for the purposes of Part I of the **Provincial Offences Act**.

*Archer v. R.*, [1955] S.C.R. 33, 20 C.R. 181

*MacKenzie v. R.* (1956), 114 C.C.C. 335 (Ont. H.C.J.)

*R. v. Gulyas* (1962), 39 W.W.R. 452 (Alta. Dist. Ct.)

*R. v. Wing* (1963), 48 W.W.R. 311 (Alta. Dist. Ct.)

*R. v. Horwitz*, [1964] 2 C.C.C. 394 (Alta. Dist. Ct.)

Included Offences: The offence of speeding is not automatically an included offence of careless driving.

*R. v. Carey* (1972), 10 C.C.C. (2d) 330 (Man. C.A.)

*Smith v. R.* (1982), 15 M.V.R. 161, 51 N.S.R. (2d) 539 (N.S.C.A.)

However, it would be possible to word a charge of careless driving in such a way as to make speeding an included offence of the offence as charged.

Conduct as a Whole: It seems clear that the defendant's conduct as a whole can be assessed. A series of acts that separately might not establish careless driving may do so as a course of conduct.

In **R. v. Marceau** (1978, Que. S.C.) a conviction for careless driving was based on a number of circumstances, including speeding for a long distance, improper passing, and going through a stop sign. The same result was reached in **R. v. Rogers** (1981, N.B.Q.B.), where the defendant's conduct included speeding, crossing a solid line, improper passing, and failing to yield right-of-way, and **R. v. McDorman** (1984, B.C. Prov. Ct.), discussed in "Condition of Vehicle and Driver" below, where the condition of the driver and of the vehicle were both taken into account in determining whether the offence was made out.

*R. v. Marceau* (1978), 2 M.V.R. 202 (Que. S.C.)

*R. v. Rogers* (1981), 34 N.B.R. (2d) 353 (Q.B.)

*R. v. McDorman* (1983), 23 M.V.R. 165 (B.C. Prov. Ct.), aff'd (1984), 27 M.V.R. 37 (Co. Ct.)

Ability of Driver: In **Skowronnek v. R.** (1980, Sask. Dist. Ct.), the defendant was charged with driving without due care and attention under the Saskatchewan **Vehicles Act**. The conduct complained of included speeding, fishtailing, spraying gravel, and a chase of the defendant by police. Viewed objectively, these would establish the offence. The defence was that the defendant was a highly-qualified rally driver and was driving a specially-equipped vehicle for the purpose of testing it. The court held that the standard required under the section was objective and not related to the proficiency or experience of the particular defendant, and convicted him.

Skowronnek v. R. (1980), 9 M.V.R. 36 (Sask. D.C.)

In **R. v. Weedon** (1987, B.C. Co. Ct.) the defendant was charged with driving without due care and attention where his conduct included speeding at very high speeds, failing to signal lane changes and tailgating other vehicles. The defendant argued that he was highly attentive to his manner of driving and so ought not to be convicted. The court held that the failure of the defendant to consider the risks he was creating by his manner of driving constituted the offence.

R. v. Weedon (1987), 7 M.V.R. (2d) 21 (B.C. Co. Ct.)

If such a situation arose in Ontario, it might be preferable to proceed under the "without reasonable consideration" limb of the section.

However, it has been held that school bus drivers may be held to a higher standard of care than other drivers, reflected in the special rules relating to the operation of school buses. This principle may be extended by analogy to any common carrier.

R. v. Malleck-Lacroix, (1991) 35 M.V.R. (2d) 46 (Ont. Prov. Ct.)

Rate of Speed: A court cannot set an arbitrary rate of speed, or rate of speed over the speed limit, and hold that exceeding this speed is *per se* careless driving, but must consider the speed together with all the other circumstances to determine if the offence is proved: see **R. v. Yolles** (1958, Ont. H.C.). There is no question that driving at very high speeds can support a conviction for careless driving, and there is no need to show there was other traffic on the highway that was endangered: see **R. v. Rieswyk** (1978, N.S. Co. Ct.); **R. v. Tyndall** (1988, Man. Prov. Ct.).

R. v. Yolles, [1958] O.R. 786 (H.C.) aff'd [1959] O.R. 206 (C.A.)

R. v. Rieswyk (1978), 1 M.V.R. 177 (N.S. Co. Ct.)

R. v. Tyndall (1988), 15 M.V.R. 336 (2d) (Man. Prov. Ct.)



Unforeseeable Obstacle: Where there is an object on the highway that the defendant could not be expected to have foreseen, and that object creates a sudden emergency not contributed to by any abnormal conduct on the part of the defendant, the offence of careless driving will not be made out: see **Mogenson v. Wright** (1962, Sask. Dist. Ct.). For an example of this principle in operation, see **R. v. Ashton** (1985, Ont. Dist. Ct.), where the defendant's motorbike struck two people in dark clothes who were lying on the road, wrestling, at night. The court held that there was no evidence from which an inference of careless driving could be drawn.

Mogenson v. Wright (1962), 39 C.R. 56 (Sask. Dist. Ct.)

R. v. Ashton (1985), 36 M.V.R. 100 (Ont. Dist. Ct.)

Condition of Vehicle and Driver: In **R. v. Wolff** (1966, Sask. Mag. Ct.) the defendant lost control of his vehicle because he had become unconscious. The defendant had been subject to such spells for some time. He was convicted of driving without due care and attention.

The combination of the condition of the driver and condition of the vehicle arose in **R. v. McDorman** (1983, B.C. Prov. Ct.). At trial, the court convicted the defendant of driving without reasonable consideration for the safety of others. He had gone thirty hours without sleep, had missed two truck route signs, had failed to attend to an air leak in the braking system that he was aware of, and had failed to make certain necessary adjustments to the trailer. The court entered a conviction based on the conduct of the defendant as a whole. The conviction was upheld on appeal.

**McDorman** involved a charge of driving "without reasonable consideration for the safety of others". The issue of whether the condition of the vehicle alone could support a conviction for driving "without due care and attention" (a separate offence in B.C.) arose in **Vandale v. R.** (1989, B.C. Co. Ct.). The court held that the condition of the vehicle alone could support a "without reasonable consideration" charge, but a charge of "due care and attention" had to be based at least partly on the manner of driving. It is clear from a close reading of the case, however, that a charge of "due care and attention" does not have to be based *solely* on the manner of driving, and a conviction may be sustained based on a combination of the manner of driving and the condition of the vehicle.

R. v. Wolff (1966), 50 C.R. 77 (Sask. M.C.)

R. v. McDorman (1983), 23 M.V.R. 165 (B.C. Prov. Ct.), aff'd (1984), 27 M.V.R. 37 (Co. Ct.)

Vandale v. R. (1989), 22 M.V.R. (2d) 288 (B.C. Co. Ct.)



Stopping Vehicle: Bringing an automobile to a temporary stop is part of driving. In **R. v. Jacobs** (1955, B.C.C.A.) the defendant, while driving on a fairly busy road on a dark night, pulled over to the wrong side of the road and stopped, without getting out of the car, to check his mailbox. An approaching vehicle coming over a hill saw the headlights and kept to their left, resulting in a collision. The defendant was convicted of careless driving.

R. v. Jacobs (1955), 113 C.C.C. 73 (B.C.C.A.)

Momentary Inadvertence: Although the leading case on "momentary inadvertence" is **R. v. Namink** (1979, Ont. Co. Ct.), the principle that momentary inadvertence will not suffice to support a conviction for careless driving is really just an application of the second limb of the test set out in **R. v. Beauchamp** (1953, Ont. C.A.). In **Namink** Killeen Co. Ct. J. stated:

Mere momentary inattention, or a simple kind of error of judgement, does not bespeak the kind of conduct over which the net of this situation is cast.

At the same time, it is trite to note that seconds can be a long time when a motor vehicle is being operated on the highway. Whether conduct will amount to mere "momentary inattention" or to careless driving is not simply a function of the length of time that the driver's attention was away from the road. It involves assessing the driver's reason for averting his attention in light of all the circumstances: see **R. v. Trombetta** (1989, Ont. Prov. Ct.), where it was held that averting one's eyes from the road even for a second or two to butt out a cigarette could constitute careless driving, but did not do so on the facts of the case.

R. v. Beauchamp (1953), 16 C.R. 270 (Ont. C.A.)

R. v. Namink (1979), 27 Chitty's L.J. 289 (Ont. Co. Ct.)

R. v. Trombetta, [1989] Ont. D. Crim. Conv. 5525-04 (Ont. Prov. Ct.)

Error of Judgment: Similarly, the principle that an error of judgment will not necessarily amount to careless driving is an application of the **Beauchamp** principles (see also **R. v. Namink** (1979, Ont. Co. Ct.), discussed under "Momentary Inadvertence", above). Conduct that has been held to fall within the scope of an error of judgment includes a driver locking the brakes in an emergency stop (**R. v. Turgeon**, 1958, Sask. Dist. Ct.), and a driver hunting for his glasses after they fell off, rather than bringing the vehicle to an immediate stop (**R. v. Whalley**, 1979, Ont. Co. Ct.). The central issue will be whether, in light of all the circumstances, the Crown has proved that both elements of the **Beauchamp** test have been met.

R. v. Beauchamp (1953), 16 C.R. 270 (Ont. C.A.)

R. v. Namink (1979), 27 Chitty's L.J. 289 (Ont. Co. Ct.)

R. v. Turgeon (1958), 120 C.C.C. 248 (Sask. Dist. Ct.)

R. v. David Whalley (1979), 4 W.C.B. 86 (Ont. Co. Ct.)

Making a U-turn across a highway without paying attention to other traffic that may be around is not "momentary inattention" or "mere error of judgment", despite the short period of time involved.

R. v. Yorston (1991), 27 M.V.R. (2d) 27 (N.S. Prov. Ct.)

Circumstantial Evidence: Because careless driving is a strict liability offence, the Crown need only prove that the defendant has committed the prohibited act; he will then be convicted unless he can show that there was no negligence on his part (or can raise some other defence). However, the Crown is required to prove careless driving, and not simply that an accident occurred.

This issue becomes particularly significant in those cases (typically single vehicle accidents) where there are no witnesses to the manner of driving and the only evidence is circumstantial. In such cases the rule in **Hodge's Case** will apply. That rule is set out in **R. v. McIver** (1966, Ont. H.C.), the leading case on such accidents, as follows (at 213-214):

Before you can find the prisoner guilty you must be satisfied beyond a reasonable doubt that the circumstances are consistent with the prisoner having committed the act and you must also be satisfied beyond a reasonable doubt that the facts are such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person....The rule makes it clear that the case is to be decided on the facts, that is, the facts proved in evidence, and the conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts. No conclusion can be a rational conclusion that is not founded on evidence.

In **McIver** the defendant was convicted of careless driving where he struck a vehicle parked off the roadway at night. It should be noted that the circumstances were led in evidence in great detail, and included the facts that the car was parked directly under a streetlamp and that the defendant's car had left the roadway far enough behind the parked car either to turn around it or to stop behind it.

In **R. v. Johnson** (1967, B.C.C.A.), the British Columbia Court of Appeal expressly (and correctly) rejected the argument that the occurrence of an accident is sufficient to establish a *prima facie* case. In **Johnson** the defendant's vehicle was found astride a low wall some thirty feet from the roadway, having skidded 61 feet and rolled to get there. The court held that without explanation of the causation or significance of the skid, the only inference that could properly be drawn was that the brakes had been applied. Braking was a normal and neutral act that could not in itself give rise to an inference of lack of care and attention. To a similar effect, see **R. v. Buchanan** (1967, Ont. Mag.Ct.), which reiterates that **McIver** does not affect the burden on the Crown to establish *prima facie* evidence of all the elements of the

offence as set out in **Beauchamp**. In light of these cases, it seems that **R. v. Ayotte** (1961, Ont. Co. Ct.) is wrongly decided on its facts, notwithstanding that it purports to follow **Beauchamp**.

The fact that a rear end collision has occurred is by itself insufficient to support a conviction for careless driving: see **Simoneau v. R.** (1951, Ont. Dist. Ct.), and compare **R. v. Ouseley** (1973, Ont. C.A.), discussed further under "Follow Too Closely: s.158(1)".

*R. v. Mclver*, [1965] 1 C.C.C. 240 (Ont. H.C.), aff'd [1965] 4 C.C.C. 182 (Ont. C.A.), aff'd [1966] S.C.R. 254

*R. v. Johnson*, [1967] 3 C.C.C. 48 (B.C.C.A.)

*R. v. Buchanan* (1967), 10 Crim. L.Q. 246 (Ont. Mag. Ct.)

*R. v. Ayotte* (1961), 37 C.R. 28 (Ont. Co. Ct.)

*Simoneau v. R.* (1951), 102 C.C.C. 282 (Ont. Dist. Ct.)

*R. v. Ouseley* (1973), 10 C.C.C. (2d) 148 (Ont. C.A.)

Autrefois: **R. v. Anthony** (1982, N.S.C.A.) provides an excellent review of the case law regarding dangerous driving, criminal negligence and careless driving. That court held that dangerous driving and careless driving are not included offences, so that a conviction or acquittal on one is not a bar to a prosecution on the other through the operation of the special pleas of *autrefois acquit*, *autrefois convict*, or the common law defence of *res judicata*. In that case the Crown withdrew the careless driving information after plea and then the accused was arraigned on the dangerous driving charge.

*R. v. Anthony* (1982), 16 M.V.R. 160 (N.S.C.A.)

Multiple Convictions: While **R. v. Anthony** remains a correct statement of the law in relation to the special pleas of *autrefois convict*, *autrefois acquit* and the common law defence of *res judicata*, the law relating to the Rule Against Multiple Convictions (the "Keinapple" rule) has been significantly modified in **R. v. Prince** (1986, S.C.C.). While a conviction for careless driving does not preclude a further conviction under the Criminal Code, a conviction under the Criminal Code may well preclude a further conviction under s. 130.

*R. v. Stadelbauer*, (1992), 36 M.V.R. (2d) ( Ont. Ct. Gen. Div.)

*R. v. Prince* [1986] 2 S.C.R. 480

### Direction of Traffic by Constable: s. 134

This section empowers a police officer to direct traffic for the purposes specified. It does not include a power to direct motor vehicles to stop for the purposes of enforcing the H.T.A. or other statutes (see **R. v. Dedman** (1985,



S.C.C.)). However, such a power is now explicitly provided in s. 48(1) and s. 216(1) of the **H.T.A.**

R. v. Dedman (1980), 55 C.C.C. (2d) 98 (Ont. Prov. Ct.) aff'd *ibid* (Ont. H.C.J.), rev'd (1981), 59 C.C.C. (2d) 97 (Ont. C.A.), rev'd (1985), 20 C.C.C. (3d) 97 (S.C.C.)

In **R. v. Bothwell** (1986, Ont. C.A.) the wilful failure to obey the direction of a police officer under this section was held to constitute the offence of obstruction of a police officer in the execution of his duty under s. 118(a) [now s. 129] of the **Criminal Code**.

R. v. Bothwell (1986), 45 M.V.R. 1 (Ont. C.A.)

### **Right of Way at Uncontrolled Intersection: s. 135**

In **Denny v. Brewer** (1961, Ont. Co. Ct.), a civil case, the court considered the effect of what are now s. 135(2) and (3) when read together. The court pointed out that on a strict and literal interpretation the two sections conflicted, and held that the appropriate way to reconcile them was (at 161):

The driver of a vehicle approaching an intersection shall yield the right-of-way to a vehicle that has entered the intersection from a different highway under such circumstances that an accident is not to be reasonably anticipated; and when two vehicles enter an intersection from different highways at approximately the same time in such a way that an accident is to be reasonably anticipated the driver on the left shall yield the right-of-way to the vehicle on the right.

Denny v. Brewer [1961] O.W.N. 161 (Co. Ct.)

### **Stop at Through Highway: s. 136**

While this section is described as "stop at through highway" it in fact contains two duties: the duty to stop encoded by s. 136(1)(a), and the duty to yield right of way contained in s. 136(1)(b).

The Stop Sign: A stop sign must be erected so as to reasonably indicate to people using the road that they are required to stop. A sign that has been turned so that it fails to do so (in this case the sign was turned 90 degrees) is no longer a stop sign within the meaning of the section.

Kraft v. Prefontaine (1963), 48 W.W.R. 510 (Sask. C.A.)

However, in **R. v. Priest** (1961, Ont. C.A.) the court held that a stop sign that complies, though not strictly, but so substantially, with the regulations as to reasonably indicate that it is authoritative and erected by the competent authority is binding on the driver, provided that he could have seen it if he had been keeping a proper lookout.

R. v. Priest (1961), 35 C.R. 32 (Ont. C.A.)

When evidence is given that a "stop sign" was erected at a location, the Crown has established a *prima facie* case. The onus is then on the defence to prove that the sign does not comply with the regulations.

R. v. Lavelle (1958), 29 C.R. 156, 122 C.C.C. 111 (Ont. H.C.)

The Crown is not required to tender in evidence the bylaw or regulation authorizing the erection of the stop sign.

R. v. Ross, [1966] 2 O.R. 273, [1966] 4 C.C.C. 175 (C.A.)

Cf. R. v. Clark (1974), 18 C.C.C. (2d) 52 (Ont. C.A.)

R. v. McLaren (1981), 10 M.V.R. 42 (Ont. C.A.)

Classification: In **R. v. Walker** (1979, Ont. Co. Ct.) the offence created by what is now s. 136(1)(a) was held to be an offence of absolute liability. Support for this view, although not firm approval, is found in the *obiter* comments of Catzman J.A. in **R. v. Brennan** (1989, Ont. C.A.) at p. 369-370.

R. v. Walker (1979), 48 C.C.C. (2d) 148, 5 M.V.R. 114 (Ont. Co. Ct.)

R. v. Brennan (1989), 52 C.C.C. (3d) 366, 18 M.V.R. (2d) 161 (Ont. C.A.)

In **R. v. Gareau** (1990, Ont. Prov. Ct.) the court considered the classification of s. 136(1)(b) in careful reasons and held (at pp. 5-6):

...in determining whether or not an infraction has been committed by a motorist of section 116(1)(b) [now 136(1)(b) of the **Act**, be it a civil infraction or a quasi criminal infraction, it is necessary to analyze the movement of one or more vehicles, one to the other; this of necessity requires a consideration of the perception of one motorist of the movement of one or other motor vehicles. In determining such liability, does it not seem reasonable or rational to permit one motorist to give his explanation (perception) of the operation of one or more other motor vehicles?

The court held that, notwithstanding the higher court decisions that have held s. 136(1)(a) is an offence of absolute liability (discussed above), the Crown had failed to establish that the offence in s. 136(1)(b) was one of absolute rather than strict liability.

R. v. Gareau (unreported, March 22, 1990, Ont. Prov. Ct. County of Middlesex, per Menzies P.C.J.)

Duty to Stop: In examining the corresponding section of the New Brunswick **M.V.A.**, which is similar to the Ont. **H.T.A.**, it has been held that there is nothing in the



section that requires one to stop at the stop sign. The stop sign requires the driver to stop at the point specified in the section (i.e., stop line, crosswalk or immediately before entering the intersection in the Ont. H.T.A.).

R. v. Bannister, [1964] 2 C.C.C. 299 (N.B. Co. Ct.)

R. v. Manship (1983), 22 M.V.R. 257, 48 M.B.R. (2d) 124 (Q.B.)

For this reason, evidence should always be led as to whether there was a stop line or crosswalk at the intersection in question.

In **R. v. MacAdam** (1976, N.S. Co. Ct.) O'Hearn Co. Ct.J. had to determine what was meant by "stop" in the corresponding Nova Scotia legislation. He held that it required a complete cessation of motion of the vehicle and a pause sufficient to observe the conditions and, in particular, whether any vehicles were so close as to constitute an immediate hazard. The first part of this definition seems self-evident. It seems to be an open question whether the "pause" requirement can be implied into the Ontario statute by the wording of s. 136(1)(b).

R. v. MacAdam (1976), 22 N.S.R. (2d) 204 (Co. Ct.)

The statutory definition of "stop" in s. 1(1) of the **H.T.A.** has no application under this section.

Duty to Yield: In **R. v. Leung** (1988, Ont. Prov. Ct.) it was held that the offences created by s. 136(1)(a) and s. 136(1)(b) are separate and distinct. There is no duty on the Crown to prove that the defendant first stopped at the stop sign where a charge is laid under s. 136(1)(b) (see also **R. v. Ross**, 1966, Ont. C.A.).

R. v. Leung (unreported, June 13, 1988, Ont. Prov. Ct., Judicial District of York, per Tinker P.C.J.)

R. v. Ross, [1966] 4 C.C.C. 175 (Ont. C.A.)

### **Yield Right of Way Signs: s. 138**

In **Hammond v. Smith** (1964, N.S. Co. Ct.), a civil case, it was held that the only difference between a stop sign and a yield sign is one of approach and entry into the intersection: with a stop sign one is required to stop, while with a yield sign one is governed by existing conditions and there is no automatic duty to stop.

There does not seem to be any direct authority as to whether s. 138(1) creates an offence of strict or absolute liability, although it could be argued that the reasoning of **R. v. Gareau** should apply and that the offence should be classified as one of strict liability (see "Stop at Through Highway: s. 138" above).

Hammond v. Smith (1964), 45 D.L.R. (2d) 762 (N.S. Co. Ct.)

R. v. Gareau (unreported, March 22, 1990, Ont. Prov. Ct., County of Middlesex, per Menzies P.C.J.)

In **R. v. Horban** (1959, Alta. Dist. Ct.) it was held that a "yield right-of-way" sign cannot be disregarded by a driver subject to it simply because the vehicle having the right of way is travelling at an excessive speed or is otherwise breaking the law.

R. v. Horban (1959), 31 W.W.R. 139 (Alta. Dist. Ct.)

For issues regarding the posting of signs, see "Stop at Through Highway: s. 136" above.

### **Right of Way on Entering Highway from Private Road: s. 119**

This section was significantly amended in 1984 (compare R.S.O. 1980, c. 198, s. 119 for the full text of the previous section). A driver is now required to yield to "all traffic approaching on the highway so closely that to enter would constitute an immediate hazard", instead of to "all traffic approaching on the highway". Also, the section formerly referred to a person "about to enter or cross", which generated much debate as to whether the duty ceased as soon as the driver began to enter the highway or continued beyond that point (see **R. v. Perry** (1948, N.B. Co. Ct.), **R. v. Hornstein** (1973, Ont. Prov. Ct.), **R. v. Langille** (1980, N.B.C.A.). The section now refers to "every driver or street car operator *entering* a highway...". This statutory change in wording negates the holdings in **R. v. Perry** and **R. v. Langille** and gives legislative recognition to **R. v. Hornstein**. In **R. v. Paolerico** (1988, Ont. Prov. Ct.) Harris P.C.J. held that by using the word "entering" the legislature unambiguously imposed a continuing duty in effect until the driver had completed his movement into the lane of traffic he intended to travel in, and was ready to proceed in that lane.

R. v. Perry (1948), 77 C.C.C. 103 (N.B. Co. Ct.)

R. v. Hornstein (1973), 11 C.C.C. (2d) 197 (Ont. Prov. Ct.)

R. v. Langille (1980), 7 M.V.R. 294 (N.B.C.A.)

R. v. Paolerico (unreported, Ont. Prov. Ct., Judicial District of York, January 29, 1988, per Harris P.C.J.)

### **Pedestrian Crossovers: s. 140**

In **R. v McLaren** (1981, Ont. C.A.) the court held that although it is necessary for the Crown to prove the existence of the bylaw designating the crossover, the evidentiary burden may be satisfied by inference from evidence of the existence of such a crossover indicated by the signs and markings commonly used for pedestrian crossovers. The marking for pedestrian crossovers is found in R.R.O. 1980, Reg. 486, s. 18. It would appear from the reasons and evidence given in **R. v McLaren** that it is not necessary to show strict compliance with the regulations in order to raise an evidentiary presumption with respect to the bylaw.

R. v. McLaren (1981), 10 M.V.R. 42 (Ont. C.A.)

In **R. v. Knutson** (1989, Sask. Q.B.) Gerein J. considered the equivalent Saskatchewan legislation, which refers to a situation where "...a pedestrian is crossing the highway...". The issue there was whether the section applied to a person who was standing in the crosswalk and who was not in motion (in that case, a school crossing guard). The court, applying a purposive analysis and noting the vulnerability of pedestrians to motor vehicles, held that a driver must still yield the right of way to a pedestrian who is stationary in the crosswalk. This reasoning would appear to apply even more strongly under the Ontario **H.T.A.**, since the language of the Ontario statute focuses on presence in the crosswalk rather than movement across it.

R. v. Knutson (1989), 13 M.V.R. (2d) 158 (Sask. Q.B.)

### **Left Turn Across Path of Approaching Vehicle: s. 141(5)**

A driver cannot avoid his duty of lookout and care simply by flashing his signal light.

Mattie v. Delory (1974), 19 N.S.R. (2d) 451 (N.S.S.C.)

### **Left Turn at Intersection: s. 141(6)**

In **R. v. Harding**, (1971, Ont. Co. Ct.) it was held that "as closely as practicable" to the centre line should be interpreted to mean "what is reasonable under the circumstances". In that case a left turn was made from a lane that was not than the left turn lane of a four lane highway. The driver's excuse was that the turning lane was full. Not wanting to block the adjacent lane he made his left turn from the "through" lane (which was not a designated turn lane as in ss. (7)). It should be noted that the wording of the subsection has been significantly amended since **R. v. Harding** was decided (compare S.O. 1968, c. 50, s. 16(1) with the current s. 141(6)) and it is unlikely that the argument made there would have any application to the current wording of the section.

R. v. Harding (1971), 2 C.C.C. (2d) 348, [1971] 1 O.R. 699 (Ont. Co. Ct.)

In **R. v. Yunger** (1961, Ont. C.A.), the predecessor to s. 121(5) was held to create only one offence that could be committed in different ways. Accordingly, a charge in the words of the section will not be bad for duplicity.

R. v. Yunger, [1961] O.W.N. 273 (Ont. C.A.)

### **Signal for Left or Right Turn: s. 142(1)**

The duty in s. 142 is not discharged where a driver signals his intention to turn simultaneously with starting the turn. There is a further duty to ensure that the manoeuvre can be made in reasonable safety.



Guimont v. Williston (1980), 30 N.B.R. (2d) 178, 70 A.P.R. 178 (N.B.C.A.)

The first requirement of s. 142(1), "shall first see that such movement can be made in safety", is not discharged by a mere glance in the rear view mirror when in fact another vehicle is attempting to pass and is in the first driver's "blind spot".

Johnson v. Hillborn, [1932] 1 D.L.R. 683, 4 M.P.R. 482 (N.S.C.A.)

In **R. v. Lebedorf** (1962, Ont H.C.) it was held that the duties imposed by s. 69(1) [now s. 142(1)] on a driver making a left (or right) turn to see that such turn can be made in safety, and to give a signal to a driver or drivers who may be affected by such turn are separate and distinct. A charge which includes both in one count is duplicitous.

R. v. Lebedorf, [1963] 2 C.C.C. 95 (Ont. H.C.)

In **R. v. M.V.L.** (1988, Alta. Prov. Ct.) s. 95(2) of the Alberta **Highway Traffic Act**, which corresponds to s. 142(1), was held to be an offence of strict liability. As the wordings of the two sections are significantly different, and as s. 171 of the Alberta act provides a statutory "reasonable care" defence, it is doubtful whether this case is much use in classifying the Ontario legislation.

R. v. M.V.L. (1988), 12 M.V.R. (2d) 33 (Alta. Prov. Ct.)

The burden of showing compliance with the duties in this section lies on the driver turning left. The duty to see that a left turn can be made in safety lies on the driver making the turn. It cannot be delegated to the drivers of oncoming stopped vehicles across whose lanes the defendant's vehicle may travel.

R. v. Thompson (1989), 16 M.V.R. (2d) 312 (N.S. Co. Ct.)

### **U-turns Prohibited: s. 143**

In **R. v. Dahle** (1983, Nfld. Dist. Ct.) it was held that this offence requires the prohibited U-turn to be made on a highway. The defendant's conviction was quashed where part of the turn was made on a parking lot adjoining the highway. It should be noted that the Newfoundland section provides, "A driver shall not turn a vehicle on a highway..." while the Ontario section states, "No driver or operator of a vehicle upon a highway shall turn the vehicle...". An argument could be made that the offence is committed in Ontario so long as the movement starts on a highway, even if the vehicle leaves the highway for part of the movement.

R. v. Dahle (1983), 19 M.V.R. 482 (Nfld. Dist. Ct.)

**Where to Stop--Intersection: s. 144(5)**

This subsection is not by its wording limited to situations where a driver is required to stop for a red light, and presumably also applies where a driver is required to stop by, for example, ss. 144(15) or 144(21).

**Amber Light--Fail to Stop: s. 144(15)**

The onus lies on the defendant to establish that it was unsafe to stop. However, there is no duty or obligation placed on a motorist to ascertain how long the light has been green and therefore to be able to know when the light will turn yellow.

R. v. Harrington (1977), 3 B.C.L.R. 217 (Co. Ct.)

**Red Light--Fail to Stop: s. 144(18)**

In **R. v. Hammond** (1978, Ont. Co.Ct.) it was held that the offence created by the predecessor to s. 144(18) was an offence of strict liability. It should be noted that the facts of that case involved a police officer who had stopped for a red light but proceeded before it turned green ("Red light--proceed before green").

R. v. Hammond (1978), 1 M.V.R. 210 (Ont. Co. Ct.)

The section was subsequently considered in detailed reasons in **R. v. Kurtzman** (1991, Ont. C.A.), where the issue before the court was whether the section created an offence of strict or absolute liability. Unfortunately, there is some ambiguity in the decision. The facts of the case involved a driver who failed to come to any stop whatsoever at a red light. The court stated (at 13):

In my view, the language of at least that part of the provision ["shall bring his vehicle to a full stop"] is mandatory and absolute and not subject to an enquiry into the reasonableness of the driver's efforts. As noted earlier, the driver either stops or he does not. In this case, he did not and, therefore, in my view, he contravened the provision.

The court in **Kurtzman** refers to **Hammond** apparently without either approval or disapproval. In view of this, and the passage quoted above, it would seem that **Hammond** continues to represent the law on "red light -- proceed before green", and leave it as an offence of strict liability, while "red light -- fail to stop" is an offence of absolute liability.

R. v. Kurtzman (1991), 31 M.V.R. (2d) 1 (Ont. C.A.)



**Erection of Signal Lights: s. 144(31)**

The fact that traffic lights are in operation at an intersection is *prima facie* evidence that they have been installed in compliance with all statutory or regulatory requirements. Where traffic lights are in operation at an intersection a driver is bound to obey them whether or not they are installed in strict compliance with any regulatory requirements, unless it can be shown that owing to deviation from those requirements the lights could not have been seen by a driver keeping a proper lookout.

R. v. Potapchuk, [1963] 1 O.R. 40 (Ont. H.C.)

**Passing, Meeting Vehicles: s. 148**

"Roadway": "Roadway" is defined in s. 1(1). That definition was refined in **Cetinski v. Forman** (1972, Ont. H.C.), where it was held that the paved portion of the road demarcated by the yellow line was the shoulder of the road (see also s. 151(3)). In **Trinidad Leaseholds v. Gordon** (1953, Ont. Co. Ct.) it was held that where only a portion of the road is ploughed clear of snow, "centre of the road" means the centre of the road cleared for travel by vehicles. However, that case predates the statutory definition of "roadway". It is unclear if it remains good law.

Cetinski v. Forman, [1972] 2 O.R. 484 (Ont. H.C.)

Trinidad Leaseholds (Canada) Inc. v. Gordon [1953] O.W.N. 83 (Co. Ct.)

Nature of the Offence: Two early cases, **R. v. Lucki** (1955, Sask. Police Ct.) and **R. v. Patterson** (1964, Ont. Mag. Ct.), held that this offence required *mens rea*. Each of these decisions has been specifically overruled by higher courts in their own jurisdictions. **Lucki** was disapproved in **R. v. Wehage** (1962, Sask. Dist. Ct.), holding the offence to be one of absolute liability, while in **R. v. McIver** (1965, Ont. C.A.) overruling **Patterson**, the offence was held to be one of strict liability where the defendant must show that the forbidden act was done without fault.

R. v. Lucki (1955), 17 W.W.R. 446 (Sask. Police Ct.)

R. v. Patterson, [1964] 1 O.R. 628 (Ont. Mag. Ct.)

R. v. Wehage (1962), 48 W.W.R. 362 (Sask. Dist. Ct.)

R. v. McIver, [1951] 2 O.R. 475, 45 C.R. 401, [1965] 4 C.C.C. 182 (Ont. C.A.); aff'd [1966] S.C.R. 254 (S.C.C.)

In **Pluard v. Sheldon** (1951, Ont. C.A.) it was held that the provisions of what are now ss. 148(2) and 148(5) only apply where both vehicles are in operation, are travelling in the same direction, and can be turned to the left or right as required by the legislation.

Pluard v. Sheldon, [1951] O.R. 761 (C.A.)

**Pass on Right--Not in Safety; Pass--Off Roadway: s. 150**

It seems that s. 150(1) proscribes the offence of "pass on right--not in safety" while s. 150(2) proscribes only the offence of "pass--off roadway". In any event, the two offences are separate and a charge including both in one count will be duplicitous.

R. v. Worden (1962), 132 C.C.C. 197 (Ont. C.A.)

**Paved Shoulder Deemed Not Part of Roadway: s. 151(3)**

See the annotation to s. 148, above.

**Follow Too Closely: s. 158(1)**

In **Re Oskey** (1955, B.C.S.C.), the British Columbia Supreme Court held that an information charging that a defendant "did unlawfully allow [his] motor vehicle to follow another vehicle too closely" failed to disclose an offence known to law as it failed to refer to the essential elements of reasonableness and prudence, and was accordingly a nullity. It should be noted that the information in that case apparently failed to include the number of the section creating the offence.

Re Oskey (1955), 31 C.R. 229 (B.C.S.C.)

See generally "Information" under **Procedure**, *supra*

The proper distance to travel behind another vehicle is an objective test based on the speed of the vehicles, the road conditions and the visibility.

Di-Fazio v. R. (unreported, Ont. Prov. Ct., July 13, 1987, Darragh P.C.J.)

In **R. v. Ouseley** (1973, Ont. C.A.), the leading case in Ontario, it was held that the mere fact of a rear-end collision is insufficient to make out a *prima facie* case that the defendant's vehicle was following too closely, since there may be other explanations for the accident, such as inattention or excessive speed (see also **levins v. R.** (1969, Ont. Co.Ct.)). However, in **Di-Fazio v. R.** (1987, Ont. Prov. Ct.) it was held that where there was evidence of the following distance, and the defendant's evidence does not include any other explanation for the accident, an inference may be drawn from the fact of the accident in determining whether the following distance was too close in all the circumstances.

R. v. Ouseley (1973), 10 C.C.C. (2d) 148 (Ont. C.A.)

levins v. R. (1969), 11 Crim. L.Q. 334 (Ont. Co.Ct.)

Di-Fazio v. R., (unreported, Ont. Prov. Ct, July 13, 1987, Darragh P.C.J.)

There can be no conviction in the absence of any (or any reliable) evidence of the distance between the two vehicles.

R. v. Ouseley, (1973), 10 C.C.C. (2d) 148 (Ont. C.A.)

R. v. Walsh (1960), 33 W.W.R. 91 (Sask. Mag. Ct.)

In **R. v. Robbins** (1990, B.C. Co. Ct.), the court held that the phrases "follow another vehicle more closely than is reasonable and prudent" and "speed of the vehicles" found in the B.C. Motor Vehicle Act import the concept of distance between two *moving* vehicles. If the leading vehicle suddenly stops, this creates an emergency situation that is not contemplated by the section. The facts of that case involved a situation where one vehicle stopped and the defendant's vehicle, which had been following that vehicle at "a considerable distance", came up from behind and struck it. It is submitted that the case is correctly decided on these facts and does not contradict the implicit holding in **Ouseley** and **levins** that a charge of following too closely *may* arise when there is evidence of the following distance between two moving vehicles and the rear vehicle strikes the front vehicle when that vehicle slows or stops.

Similarly, it does not contradict the holding in **Di-Fazio** that where there is evidence of the following distance, an accident occurs, and there is no other explanation for the accident, an inference may be drawn from the fact of the accident as to whether the distance between the two vehicles when they were both moving was in fact too close in all the circumstances. In both situations, it is not the accident but the following distance that is the offence. The fact of the accident is only evidentially relevant. It is submitted that **Robbins** is *not* authority for the proposition that a charge of following too closely may never be laid where the lead vehicle was not moving at the time it was struck.

R. v. Robbins (1990), 22 M.V.R. 201 (B.C.Co.Ct.)

R. v. Ouseley (1973), 10 C.C.C. (2d) 148 (Ont. C.A.)

R. v. levins (1969), 11 Crim. L.Q. 334 (Ont. Co. Ct.)

R. v. Di-Fazio, (unreported, Ont. Prov. Ct., July 13, 1987, Darragh P.C.J.)

### **Emergency Vehicle Approaching: s. 159**

County Court Judge O'Hearn found a contravention of the Nova Scotia provision regarding failure to yield to an emergency vehicle where the defendant was culpably ignorant in his positive duty to so conduct himself as to be able to hear an audible siren, that is, a siren that can be heard without difficulty by motorists who have to yield to it.

R. v. Delory (1972), 8 C.C.C. (2d) 367 (N.S. Co Ct.)

In **Coderre v. Ethier** (1978, Ont. H.C.) it was held that the duty of a driver to stop "clear of any intersection" means that he may not cross an intersection where an emergency vehicle is approaching and will probably attempt to cross regardless of the colour of the traffic lights. This holding, it is submitted, is supported by the combined effect of ss. 159(1), 144(8), 144(12) and 144(20).

*Coderre v. Ethier* (1978), 19 O.R. (2d) 503 (Ont. H.C.)

### **Drive While Crowded: s. 162**

A Sask. District court defined overcrowding as "more persons than will allow the driver to operate his vehicle freely without interference and safely; that is, if his movements, or any of them, as they affect the gear shift lever, the brakes, the clutch, the accelerator, the steering wheel, are impeded or interfered with, or if his vision is cut down so that he cannot safely drive or operate his vehicle, then it is overcrowded. Numbers as such are not an absolute guide for a conclusion as to overcrowding".

It is clear that the offence may be committed with no passengers at all if articles of property are placed so as to interfere with the driver. A single passenger occupying a position of sufficient proximity to the driver could fulfil the elements of the offence.

The reference to proper management, as distinguished from control of the motor vehicle, would encompass, it is submitted, the interference with operation of such items as the signal light lever or headlight switches.

*R. v. Patrick* (1955), 16 W.W.R. 23 (Sask. Dist. Ct.)

### **Stop at Railway Crossing Signal: s. 163**

In **R. v. Holmes** (1953, N.S. Co. Ct.) it was held that the offence will be made out where there is a failure to remain stopped. When the warning is given the vehicle must stop but, as the warning is a continued warning, a driver must remain stopped until the apprehended danger is past. The Ontario section is worded somewhat differently and it may be that provided a driver stops and it is safe to continue, the offence is not made out even if the driver crosses while the signal is operating. Note, however, the provisions of s. 164.

*R. v. Holmes* (1953), 71 C.C.C. 358 (N.S. Co. Ct.)



**Parking Infractions: s. 170**

Where a motorist parked his vehicle in a prohibited parking area designated as a snow removal area on a day when no snow was on the ground and the seasonal parking prohibition was due to expire in eight days, the charge was dismissed on the basis of the maxim *de minimus non curat lex* (the law does not concern itself with trifles). A conviction of the defendant would only bring the administration of justice into ridicule and contempt having regard to all the circumstances.

R. v. Webster (1981), 10 M.V.R. 310, 15 M.P.L.R. 60 (Ont. Dist. Ct.)

The liability of an owner is discussed in the annotations to s. 207 *infra*.

A vehicle stopped on the shoulder is not on the "roadway".

Cetinski v. Forman, [1972] 2 O.R. 484 (H.C.)

**Racing on Highway: s. 172**

A series of cases dating back to 1918 have considered what is required for a race under this section or similar legislation.

In **Canning v. Wood** (1918, N.S.C.A.) the defendant came up behind the plaintiff and signalled his intent to pass. The plaintiff moved to the side of the road, but then increased his speed to stay level. Neither vehicle exceeded the speed limit. The trial judge held that this would constitute a race. The Court of Appeal overturned the conviction. Richie C.J. stated (at 529):

I think the word "race" as used in the section means a pre-arranged race....A race conveys the idea that the persons engaged will attain as high a rate of speed as possible; it cannot, I think, be called a race within the meaning of the Act, where both parties are not exceeding the moderate rate of speed permitted by the Act.

These reasons seem to set out two tests that must both be met in order to constitute a race (a) prearrangement, and (b) exceeding the speed limit. It should be noted, however, that of the five judges who sat on the case only three held categorically that the conduct did not constitute a race and only two adopted the above reasoning.

In **Gore Mutual Insurance Co. v. Rossignoli** (1964, Ont. C.A.) the court held that evidence that two vehicles had travelled abreast for approximately 200 feet and had passed through a stop sign was insufficient to establish a race where there was no evidence of the speed of the vehicles. However, the court disapproved a statement in a textbook (unattributed but apparently referring to **Canning v. Wood**) that "informal speed contests" where a driver who does not want to be passed endeavours to avoid that happening could not constitute a race. It held that each case must be decided on its facts, and if the drivers continued to travel abreast for an



undue time or exceeded the speed limit, they could be considered to be racing. The court also suggested (at 277) that "[t]here can hardly be a race unless both parties have the intention of creating a race" but even if this is correct (see below) it would not go so far as to require pre-arrangement or an explicit agreement between the drivers.

**Gore Mutual v. Rossignoli** was cited with approval in **R. v. Penny** (1967, Ont. Co. Ct.). In that case two cars were stopped abreast at a traffic light. When the light changed they accelerated away and reached a speed that the judge found was "perhaps in excess of the speed limit". The court held that on the facts there was no arrangement to race and no intention to race, and therefore no race.

Both **Canning v. Wood** and **R. v. Penny** were considered in **R. v. Smith** (1971, Sask. Dist. Ct.). In that case the defendant and another vehicle stopped side by side on the highway. The drivers looked at each other, they then accelerated rapidly and quickly reached a speed well in excess of the speed limit. The court held that an agreement to race could be inferred from the observed conduct of the parties. Given the rate of speed and the conduct of the parties in the case, an inference could be drawn of an intent to race.

In **R. v. Flannery** (1982, Man. Co. Ct.) the defendant's vehicle and another vehicle moved into line abreast on a two-way street (so that the defendant's vehicle was in the lane for oncoming traffic) in a residential area and quickly accelerated to a speed at or near the speed limit. This was done three times. The defendant argued that the charge was not made out since there was no pre-arrangement, no intention to race, and no excessive speed. The court, disapproving the holding in **Canning v. Wood** that a race requires both pre-arrangement and excessive speed, accepted the "observed conduct" test of **Smith** and distinguished **Gore Mutual v. Rossignoli** on the facts. The court held that prearrangement was not necessary where the "observed conduct" test was met. With respect to speed, the court stated (at 120-121):

...speed or excessive speed is relative and only one element of a race....If the conduct and actions and method of driving are such that the only logical and common sense conclusion can be that two or more vehicles are in a moving situation--one attempting to outdo another no matter at what speed and exhibiting a concerted routine effort to do so, then speed is not an essential ingredient.

The court dismissed the defendant's appeal.

It is submitted that the approach taken in **Flannery** is correct, and is not inconsistent with the Ontario cases of **Gore Mutual** and **Penny**. In both those cases, the results reached on the evidence accepted by the trier of fact are consistent with the results that would be reached on the tests set out in **Flannery**.

One issue that remains unresolved is whether both drivers need an intention to race or whether only the defendant need have such an intention. In **Gore Mutual McGillivray**, J.A. stated at one point that "[t]here can hardly be a race unless both parties have the intention of creating a race", but shortly afterward appeared to contemplate the possibility that only one driver need have the intention to race.

Canning v. Wood (1918), 44 D.L.R. 525 (N.S.C.A.)

Gore Mutual Insurance Co. v. Rossignoli, [1964] 2 O.R. 274 (C.A.)

R. v. Penny (1967), 3 C.R.N.S. 13 (Ont. Co. Ct.)

R. v. Smith, [1971] 5 W.W.R. 674 (Sask. Dist. Ct.)

R. v. Flannery (1982), 15 M.V.R. 116 (Man. Co. Ct.)

### **School Bus Stopped on Highway: s. 175**

In **R. v. Cooke** (1989, Sask. Q.B.) the court treated the companion offence under the Saskatchewan **Highway Traffic Act** as one of strict rather than absolute liability. On this issue, the penalty provisions of s. 175(17) should be noted. The fines are significant. In addition s. 175(17)(b) provides for imprisonment upon a second or subsequent conviction. An offence that provides for the possibility of imprisonment for an offence of absolute liability violates s. 7 of the **Charter**: see Reference Re s.94(2) of the British Columbia Motor Vehicle Act, (1985, S.C.C.) Accordingly, it is submitted that the offence is one of strict liability.

R. v. Cooke (1989), 19 M.V.R. (2d) 284 (Sask. Q.B.)

Reference Re s. 94(2) of the British Columbia Motor Vehicle Act (1985), 23 C.C.C. (3d) 289, 48 C.R. (3d) 290 (S.C.C.)

See "Strict and Absolute Liability" in **General Principles and Defences**

In **R. v. Laing** (1985, Alta. C.A.) the court held that the space between two parallel yellow lines was not a "median" within the meaning of the Alberta **Highway Traffic Act**. That definition of median uses the same phrase ("physical barrier") as the Ontario definition of "median strip" (see s. 1(1)).

R. v. Laing (1985), 69 A.R. 81 (Alta. C.A.)

### **Disobey Sign: s. 182**

Strict compliance with the regulations governing erection of signs is not required. A sign will be effective if there is substantial compliance, albeit with a slight deviation, provided that there is a reasonable indication of its authority. The deviation only becomes significant if a driver keeping a reasonable lookout could not have seen the sign.

R. v. Priest, [1961] O.W.N. 166, 35 C.R. 32 (C.A.)

Where a sign has been erected pursuant to a regulation or by-law, there is a presumption that it was erected in compliance with the regulations

R. v. Lavelle (1958), 29 C.R. 156, 122 C.C.C. 111 (Ont. H.C.)

Where a sign is erected pursuant to a by-law, the court generally cannot take judicial notice of the by-law authorizing the sign. However, while it is necessary for the Crown to prove the existence of the by-law, the evidentiary burden may be satisfied from evidence of the existence of the signs themselves.

R. v. Clark (1974), 18 C.C.C. (2d) 52 (Ont. C.A.)

R. v. McLaren (1981), 10 M.V.R. 42 (C.A.)

A sign must be clear and open to only one interpretation having regard to the nature of the intersection where it is placed. In **R. v. Fillmore** (1977, N.S. Ct. Ct) a defendant was acquitted where the intersection was a traffic circle in combination with an entrance to a parking lot and it was unclear what the no-turn sign referred to.

R. v. Fillmore (1977), 76 N.S.R. (2d) 631, 40 A.P.R. 631 (N.S. Co. Ct)

This section does not apply to signs erected on federal property by a federal ministry pursuant to federal legislation.

R. v. DeBou, [1978] 2 W.W.R. 381 (B.C. Co. Ct)

### **Duty to Report Accident: s. 199**

For the purposes of this section the prescribed amount for damage to property is \$700. (see **R.R.O. 1990 Reg. 596(11)**).

Interpreted literally, this section is very broad and encompasses accidents involving motor vehicles whether on or off the highway: see **R. v. Berg**, (1956, Ont. Co. Ct.) followed in **R. v. Bell**, (1968, Sask. Q.B.). It appears from **R. v. Hisey** (1985, Ont. C.A.) that this broad interpretation does not render the section unconstitutional on division of powers grounds.

R. v. Berg, [1956] O.W.N. 653 (Co. Ct.)

Bell v. R., [1969] 2 C.C.C. 9 (Sask. Q.B.)

R. v. Hisey, (1985), 40 M.V.R. 152 (Ont. C.A.), discussed under "Fail to Stop for Police: s. 216", below



**Duty:** Unless it is established that a person was actually in charge or control of the vehicle involved in the accident, no duty of disclosure is cast upon him: see **R. v. Patrick** (1960, Ont. C.A.). This is qualified by 199(2) which requires that an occupant of the vehicle make the report if the person in charge is physically incapable of doing so. It should be noted that s. 207, regarding owner's liability, does not apply to s. 199.

R. v. Patrick (1960), 32 C.R. 388 (Ont. C.A.)

**"Forthwith":** Section 199(1) requires that the report be made "forthwith". In **R. v. Pearson** (1960, Sask. Mag. Ct.) the accident occurred about 3:00 p.m. on a Sunday but the defendant did not report it until 9:00 p.m. the same day. The court acquitted the defendant, holding that "forthwith" meant "within a reasonable time having regard to all the circumstances of the case". A similar definition was applied in **R. v. Bell** (1968, Sask. Q.B.), rejecting the test applied at trial of "at the first opportunity". The **Pearson** definition was applied again in **R. v. Marler** (1972, N.B. Co. Ct.), where the defendant was convicted when the accident happened during the night, he was released from hospital at 2:30 a.m., and the accident was not reported until 4:00 p.m. The only reported Ontario case on the issue, **R. v. Bakker** (1986, Ont. Prov. Ct.) is ambiguous as to whether the correct test to be applied is the test from **Pearson** or "as soon as practicable" (if in fact there is a difference between these two tests).

R. v. Pearson (1960), 32 W.W.R. 457 (Sask. M.C.)

Bell v. R., [1969] 2 C.C.C. 9 (Sask. Q.B.)

R. v. Marler (1972), 17 N.B.R. (2d) 663 (N.B. Co. Ct.)

R. v. Bakker (1986), 48 M.V.R. 190 (Ont. Prov. Ct.)

**Assessment of Damage:** The driver of a vehicle involved in an accident is under a duty to make an assessment of the injury or damage immediately following the accident unless he is physically unable to do so. Delay in making such an assessment will not be a defence to failure to report, even if a report is made forthwith after the assessment.

R. v. Bakker (1986), 48 M.V.R. 190 (Ont. Prov. Ct.)

**Effect of Criminal Charge:** Once a person has been arrested for or charged with a criminal offence arising out of the accident or the conduct of the person leading up to it, he is under no further duty to comply with the requirements of this section.

Laguff v. R. (1979), 7 M.V.R. 234 (Ont. Co. Ct.)

Delegation: In New Brunswick it has been held that the obligation to report can be delegated: see **R. v. Miller** (1981, Q.B.). It is unclear whether this is the law in Ontario. While s. 199(2) places a duty on another occupant to report where the driver is unable to do so, it involves a separate duty to report rather than a delegation.

R. v. Miller (1981), 36 N.B.R. (2d) 181 (N.B.Q.B.)

### **Fail to Remain: s. 200**

Section 200(1)(a) creates one offence only, which is constituted by a failure to do both acts (remain at or immediately return to). An information charging the offence in the words of the section is not duplicitous.

R. v. Budden, [1964] 2 C.C.C. 190 (Ont. Mag. Ct.)

Nature and Classification: It is submitted that the offence created by s. 200 is an offence of strict liability. The onus on the Crown is merely to prove that an accident did occur and that the defendant failed to comply with the section. The penalties set out in s. 200(2) support this: since imprisonment is a possible penalty, the section cannot in light of **Reference Re Section 94(2) of the B.C. Motor Vehicle Act** (1985, S.C.C.) be one of absolute liability. Where an offence provides for imprisonment as a possible penalty it should be classified as an offence of strict rather than absolute liability: see **R. v. Cancoil Thermal Corp. and Parkinson** (1986, Ont. C.A.) The view that the section creates an offence of strict liability is also supported by **R. v. Clarke** (1984, B.C. Co. Ct.)

While this view is inconsistent with **R. v. Hill** (1973, S.C.C.), that decision predates by several years the decision of the Supreme Court of Canada in **R. v. City of Sault Ste. Marie**. Hill held that an honest and reasonable belief in facts that if true would have made the conduct non-culpable provides a defence. This is no longer the law.

Similarly, the holding in **R. v. Racimore** (1975, Ont. H.C.) that lack of knowledge of the accident renders the conduct involuntary and means that the offence is not made out is no longer good law. It is only where the lack of knowledge is reasonable or where the defendant has exercised due diligence that he will have a defence (this may be what Grange J. means by the reference to "deemed knowledge" on p. 148).

Reference Re s. 94(2) of the B.C. M.V.A. (1985), 23 C.C.C. (3d) 289 (S.C.C.)

R. v. Cancoil Thermal Corp and Parkinson (1986), 27 C.C.C. (3d) 285 (Ont. C.A.)

R. v. Clarke (1984), 27 M.V.R. 65 (B.C. Co. Ct.)

R. v. Hill (1973), 14 C.C.C. (2d) 505 (S.C.C.)



R. v. City of Sault Ste. Marie (1977), 40 C.C.C. (2d) 353 (S.C.C.)

R. v. Racimore (1975), 25 C.C.C. (2d) 143 (Ont. H.C.)

Meaning of "Accident": The meaning of accident raises two problems: what physical consequences are necessary for an accident, and whether an intentional incident can be an "accident" within the meaning of the section.

On the first point, the English Court of Appeal (Criminal Division) in **Morris v. R.** (1971), defined "accident" as "an unintended occurrence that has an adverse physical result". The court noted that this definition was subject to a *de minimis* exception where the physical consequences were trivial. The holding in **Morris** that an accident requires damage as well as contact was approved by the minority in **Hill** (1973, S.C.C.) but the point was expressly left open by the majority. The definition in **Morris** was approved in **Khan v. R.** (1982, Ont. Prov. Ct.), but in reaching this decision the court relied on an extract from **Hill** that in fact is part of Spence J.'s dissent. As a result, it is not clear whether damage, as well as contact, is necessary for an "accident".

In **R. v. Hannam** (1985, Alta. Q.B.) the defendant was racing another motor vehicle which then cut into her lane, lost control, and struck a pole. The defendant argued that, since the vehicles did not come into contact, there was no accident and in any event she was not "involved" in any accident. The court on an application to quash the committal held that contact was not a prerequisite for an accident and that the word "involved" did not import any element of cause or contribution. As there was some evidence of involvement, the application to quash the committal was dismissed.

Morris v. R. (1971), 56 Cr. App. R. 175 (C.A.)

Hill v. R. (1973), 14 C.C.C. (2d) 505 (S.C.C.)

Khan v. R. (unreported, Ont. Prov. Ct., Aug. 16, 1982)

R. v. Hannam (1986), 1 M.V.R. (2d) 361 (Alta. Q.B.)

The second issue is whether intentional conduct is an accident within the meaning of the section. In **R. v. Street** (1970, B.C. Co. Ct.) the court held that deliberate ramming another vehicle would be an "accident" within the meaning of the section, since the consequences from the point of view of the driver were no different to unintentional contact. This view was rejected in **R. v. Steer** (1982, B.C. Prov. Ct.), which held that deliberate conduct could not be an accident. **Steer** was followed, and **Street** rejected, in **R. v. O'Brien** (1987, Nfld. S.C.). However, in **R. v. Hansen** (1988, B.C.C.A.) the court considered the legislative history of s. 236(1) [now R.S.C. 1985, s. 252(1)] and pointed out that the emphasis in earlier versions of the section was not on the intention of the ramming driver, but on the harm caused to persons or to other vehicles and the duty to assist. The court accordingly approved **Street** and

disapproved **Steer**. It is submitted that both the reasoning in **Hansen** and the result are persuasive and should be applied to s. 200(1).

R. v. Street (1970), 5 C.C.C. (2d) 232 (B.C. Co. Ct.)

R. v. Steer (1982), 17 M.V.R. 217 (B.C. Prov. Ct.)

R. v. O'Brien (1987), 7 M.V.R. (2d) 137 (Nfld. S.C.)

R. v. Hansen (1988), 46 C.C.C. (3d) 504 (B.C.C.A.)

In **R. v. Khan** (1982, Ont. Prov. Ct.) it was held that the duties in s. 200 do not apply to a collision between a motor vehicle and an inanimate or unattended object.(but see s. 201)

R. v. Khan (unreported, Ont. Prov. Ct., Aug. 16, 1982)

### Notification of Damage: s. 201

This section imposes a duty to report the damage to the nearest police officer.

R. v. Redekop Builders (Port Colborne) Ltd. (1972), 12 C.C.C. (2d) 470 (Ont. Co. Ct.)

### Vehicle Owner May Be Convicted: s. 207

General: This section replaces the former s. 147(1), which stated that the owner "shall incur the penalties...." The wording of the section now states that the owner "may be charged with and convicted of an offence...." This change in wording renders irrelevant the obiter comments in **R. v. Gauthier** (1977, Ont. H.C.) that the section discloses no offence of which a person might be convicted as owner.

R. v. Gauthier (1977), 36 C.C.C. (2d) 420 (Ont. H.C.)

The leading case regarding the liability of a vehicle owner for a parking violation is **R. v. Budget Car Rentals** (1981, Ont. C.A.). **Budget** was based on a violation of a by-law passed pursuant to s. 460 of the **Municipal Act**. The owner was convicted under s. 460 paragraph 8(b) of the **Municipal Act**, which holds the owner "liable to any penalty provided under a by-law...". Reference was made to s. 147(1) (before it was amended as the offence date was prior to amendment). Although any reference to s. 147(1) was *obiter* the case is useful in this context as it clearly establishes the concept of owner's liability.

It was also noted in **Budget Car Rentals** that a person must be specifically charged as owner so that he appreciates the nature of the offence and the defences open to him (see also **R. v. Lockie** (1950, Ont. H.C.), **R. v. Greenfield** (1954, Ont. H.C.) and **R. v. Webb** (1961, B.C.S.C.).

R. v. Budget Car Rentals (1981), 57 C.C.C. (2d) 201 (Ont. C.A.)

R. v. Lockie (1950), 10 C.R. 477 (Ont. H.C.)

R. v. Greenfield, [1954] O.W.N. 20 (Ont. H.C.)

R. v. Webb (1961), 131 C.C.C. 276 (B.C.S.C.)

Scope of Section: The offences that an owner may not be held liable for are set out in s.181(2).

Meaning of "Owner": The term owner is not defined in the **Highway Traffic Act**. For a discussion of its scope, see the annotations to the **Compulsory Automobile Insurance Act**. The provisions of ss. 207(3),(4) and (5) expand the common law definition.

Burden of Proof: The burden of proving the exception that the vehicle was in the possession of some person other than the owner without the owner's consent rests upon the owner of the vehicle.

R. v. Arbon (1981), 11 M.V.A. 227 (Ont. Div. Ct.)

Multiple Convictions: The offences of owner and driver under the **Motor Vehicle Act** (B.C.) are separate and distinct and are not proceedings "in respect of the same cause" within the meaning of those words as they appear in the **Summary Convictions Act**. It follows that an individual may be charged with an offence under the **Motor Vehicle Act** either as driver or owner of a motor vehicle, or both.

R. v. Webb (1961), 131 C.C.C. 276 (B.C.S.C.)

In **Regina v. Vaugeois** (1959, B.C.C.A.) it was held without written reasons that a conviction or acquittal as driver under the British Columbia section governing failure to remain is no bar to a subsequent charge as owner for the same offence.

R. v. Vaugeois (1959), 29 W.W.R. 368 (B.C.C.A.)

Charter Issues: In **R. v. Pellerin** (1989, Ont. C.A.), the court held that the offence created by s. 207(1) was an offence of absolute liability, since the section provided only one specific defence and its language could not be construed as permitting the defences of due diligence or reasonable care. In reaching this conclusion, it approved the conclusions in **R. v. Burt** (1987, Sask. C.A.) and **R. v. Gray** (1988, Man. C.A.) and disapproved **R. v. Watch** (1983, B.C.S.C.). Accordingly, where s. 207 is combined with an offence that provides imprisonment as a possible punishment it violates s. 7 of the **Charter** for the reasons developed in **Reference Re s. 94(2) of the Motor Vehicle Act** (1985, S.C.C.) The Crown adduced no evidence in support of a s. 1 justification.

Whether the offence created where s. 207 is combined with a provision that does not provide for imprisonment violates s. 7 of the **Charter** was considered in **R. v. Kehoe** (1990, Ont. Prov. Ct.). The defence argued that the possibility of imprisonment for non-payment of a fine triggered the operation of s. 7 of the **Charter** and rendered the section unconstitutional. In an extensive and careful judgment, Megginson P.C.J. considered the fine default provision of the **P.O.A.** and held that there was no violation of s. 7 of the **Charter** in such a situation.

*R. v. Pellerin* (1989), 10 M.V.R. (2d) 165, 67 C.R. (3d) 305 (Ont. C.A.)

*R. v. Burt* (1987), 7 M.V.R. (2d) 146, 38 C.C.C. (3d) 299 (Sask. C.A.)

*R. v. Gray* (1988), 9 M.V.R. (2d) 152 (Man. C.A.)

*R. v. Watch* (1983), 24 M.V.R. 224 (B.C.S.C.)

Reference Re s. 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486

*R. v. Kehoe* (1990), 21 M.V.R. (2d) 24 (Ont. Prov. Ct.)

### **Evidence: s. 210(7)**

In **R. v. Koomans** (1977, Ont. H.C.) it was held that a certificate could not be received as evidence of its contents under this section where the seal was "a completely illegible impression". However, this decision may now be superceded by **R. v. Kapoor** (1989, Ont. H.C.).

*R. v. Koomans* (1977), 48 Chitty's L.J. 173 (Ont. H.C.)

*R. v. Kapoor* (1989), 19 M.V.R. (2d) 219 (Ont. H.C.)

### **Judge to Secure Possession: s. 211**

An out-of-province driver's licence may be seized under this section. Once seized it must be remitted to the Registrar of the province that issued it.

*R. v. Gour* (1986), 28 C.C.C. (3d) 52 (Ont. C.A.)

### **Driver Improvement Program-Suspension of Fine: s. 215**

In **R. v. Sortino** (1981, Ont. C.A.), the court held that the provisions regarding attendance at a Ministry conducted driver improvement program and a resulting judicial discretion to lower the fine contained in the former s. 152a(2) (R.S.O. 1970, c. 202) were not conducive to an application of s. 71 of the **P.O.A.** The result was the offender had to attend and successfully complete the course and then re-attend before the same justice in order for the justice to determine whether the fine was to be reduced. This procedure greatly frustrated the **P.O.A.** provision.



Section 152a(2) was subsequently replaced by s. 215(2) which turns upon the convicted party's agreement to attend rather than the attendance itself.

The new legislation, it is submitted, corrects the difficulties of the former s. 152a(2) and, as a result, is compatible with the provisions of s. 71a of the P.O.A.

R. v. Sortino (1981), 60 C.C.C. (2d) 166 (Ont. C.A.)

### **Power of Police to Stop Vehicles: s. 216(1),(2)**

Introduction: The purpose of s. 216(1) is confer on police officers the power, in the lawful execution of their duties and responsibilities, to require drivers of motor vehicles to stop.

R. v. Hisey (1985), 40 M.V.R. 152 (Ont. C.A.), leave to appeal to the S.C.C. refused  
April 22, 1986

It should be noted that the **Highway Traffic Act** contains a specific power to stop vehicles for "spot checks" in order to enforce the **Criminal Code** drinking and driving provisions.

Highway Traffic Act, s. 48(1)

Constitutional Validity: In **R. v. Hisey**, (1985, Ont. C.A.), the court considered whether s. 216 was a valid exercise of provincial power under the **Constitution Act, 1867**, given that it was not limited to motor vehicles travelling on a highway. The court held that the provincial power to regulate motor vehicle traffic was not limited to motor vehicles on the highway, as the power could be supported by s. 92(13) (property and civil rights) and s. 92(16) (generally all matters of a merely local and private nature in the province) as well as s. 92(10) (local works and undertakings). The power to stop vehicles is part of the regulation of motor vehicle traffic, and the fact that an offence is created (including the aggravated offence created by the sentencing power in s. 216(3)) is ancillary to the power to stop and makes that power more effective. Accordingly, the section is properly characterized as valid provincial legislation and not legislation in relation to criminal law.

The court further considered whether the section was rendered inoperative on paramountcy grounds by s. 118(a) [now R.S.C. 1985, s. 129(a)] of the **Criminal Code**, which creates the offence of obstructing a peace officer in the execution of his duty. It held that it was not. Valid provincial legislation will not be held to be inoperative unless there is actual incompatibility in operation between it and the federal provision (see **Multiple Access v. McCutcheon**, (1982, S.C.C.), and even if there was duplication here (a point the court made no finding on) there was no actual conflict or contradiction.



R. v. Hisey (1985), 40 M.V.R. 152 (Ont. C.A.), leave to appeal to the S.C.C. denied April 22, 1986

Multiple Access Ltd. v. McCutcheon, [1982] S.C.R. 161, 138 D.L.R. (3d) 1, 44 N.R. 181 (S.C.C.)

In **R. v. Hufsky**, (1988, S.C.C.) the court held that an organized programme of roadside "spotchecks" under s. 216(1) violated the right not to be arbitrarily detained under s. 9 of the **Charter**. However, in light of evidence demonstrating the overriding importance of the effective enforcement of motor vehicle laws and regulations in the interests of highway safety, the infringement of s. 9 was saved by s. 1 of the **Charter**. The same conclusion was reached in **R. v. Ladouceur** (1990, S.C.C.) with respect to "routine check" random stops not part of an organized programme.

Hufsky v. R. (1988), 40 C.C.C. (3d) 398 (S.C.C.)

R. v. Ladouceur, [1990] 1 S.C.R. 1257, 56 C.C.C. (3d) 22 (S.C.C.)

**Nature of the Offence:** The offence created by s. 216(1) and s. 216(2) is a strict liability offence and there is no necessity for the Crown to prove the existence of *mens rea*:

The doing of the prohibited act, namely, the failing to come immediately to a safe stop in the circumstances specified in subs. 1, *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care.

R. v. Dilorenzo; R. v. Bancroft (1983), 11 C.C.C. (3d) 13, 48 M.V.R. 259 (Ont. C.A.) at 272

The mental element required where the aggravating circumstances contained in s. 216(3) are alleged is discussed in "Escape by Flight", *infra*.

**Form of Charge:** In **Day v. R.**, (1988, Ont. Dist. Ct.) a charge that the defendant:

...did commit the offence of being the driver of a motor vehicle did fail to immediately come to a safe stop when signalled or requested to stop by a police officer readily identifiable as such and did wilfully continue to avoid police while a police officer gave pursuit and did thereby commit an offence contrary to the **Highway Traffic Act**, s. 216(3)

was held not to disclose an offence known to law. The court noted that the Court of Appeal in **R. v. Dilorenzo**; **R. v. Bancroft**, (1983, Ont. C.A.), had held that s. 216(1) and s. 216(2) created an offence whereas s. 216(3) did not. As the information failed to refer to the numbers of the sections creating the offence and failed to allege all the elements of s. 216(1), it disclosed no offence known to law.

Day v. R. (1985), 36 M.V.R. 221 (Ont. Dist. Ct.)

R. v. Dilozenzo; R. v. Bancroft, (1983), 11 C.C.C. (3d) 13, 26 M.V.R. 259 (Ont. C.A.)

In **R. v. Dilozenzo**; **R. v. Bancroft**, the Ontario Court of Appeal referred with apparent approval to a charge in the following form:

...did commit the offence of failing to stop his motor vehicle when signalled or requested to stop by a police officer who was readily identifiable as such, contrary to subsections 216(1) and 216(2) of the Highway Traffic Act.

R. v. Dilozenzo; R. v. Bancroft, *supra*, at 277

"Police Officer": It should be noted that ss. 216(1) and 216(3) refer to a "police officer" rather than to a "peace officer", and are therefore narrower than the corresponding legislation in some other provinces.

"In the Lawful Execution of His or Her Duties and Responsibilities": The wording of this phrase appears to be broader than the wording of s. 270(1)(a) of the **Criminal Code** (assaulting a peace officer), since that section refers only to "the execution of his duty".

The duties of police officers in Ontario are set out in the **Police Act**, and include:

...preserving the peace, preventing robberies and other crimes and offences, including offences against the by-laws of the municipality, and apprehending offenders...

Police Act, R.S.O. 1980, c. 381, s. 57

It has also been judicially acknowledged that the control of highway traffic has become an important police function in modern times.

R. v. Dedman (1981), 59 C.C.C. (2d) 97 at 103 (Ont. C.A.), *aff'd* (1985), 20 C.C.C. (3d) 97 (S.C.C.)

In **R. v. Joannis**, (1986, Ont. Dist. Ct.) it was held that a police officer who stops a person to charge him with a violation of the **Highway Traffic Act**, or to warn him with respect to such a violation, is acting in the execution of his duties.

R. v. Joannis (unreported, Ontario Dist. Ct., Judicial District of Ottawa-Carleton, Feb. 25, 1986, per Mercier D.C.J.)

Furthermore, it would appear that a police officer who stops a motor vehicle in order to check the license and sobriety of the driver and the insurance and mechanical fitness of the vehicle (and presumably to check compliance with any other federal and provincial legislation with respect to motor vehicles and their operators) will be acting in the lawful execution of his duties and responsibilities, whether or not he has grounds or cause to believe that the particular driver has in fact committed an offence.

R. v. Hufsky, [1988] 1 S.C.R. 621, 40 C.C.C. (3d) 398 (S.C.C.) at 406

"Signalled Or Requested": The following have been either implicitly or explicitly recognized as signals or requests or requests to stop:

- (a) waving a flashlight in the path of the defendant's car: **R. v. Ellis** (1947, (Sask. Sask. Dist. Ct.);
- (b) holding up a hand in a palm outward "stop" position by a police officer standing in the path of the defendant's vehicle: **R. v. Harms**, (1967, Sask. Mag. Ct.);
- (c) the operation of flashing red lights on the roof of a marked police cruiser travelling behind the defendant's vehicle: **R. v. Walker** (1982, Sask. Prov. Ct.); **R. v. Brisson**; **R. v. Kennedy** (1986, Ont. C.A.);
- (d) the operation of flashing red lights on the roof of a marked police vehicle and operation of the horn of the vehicle: **R. v. Dileozenzo**; **R. v. Bancroft**;;
- (e) the pulling of an unmarked police vehicle driven by a uniformed police officer into the defendant's lane so as to block his vehicle coupled with a verbal demand to stop: **R. v. Dileozenzo**; **R. v. Bancroft**, (1983, Ont. C.A.);
- (f) the operation of the flashing red lights and siren on a marked police vehicle: **R. v. Brisson**; **R. v. Kennedy**, (1986, Ont. C.A.);
- (g) a verbal demand to stop coupled with a hand motion given by a uniformed police officer: **R. v. Parton** (1983, Alta. Q.B.);

In **R. v. Ellis**, (1947, Sask. Dist Ct.), it was held that "signal" means "to notify or communicate by signal". Where a defendant did not consciously receive the signal the offence was not made out. This holding was not followed in a subsequent Saskatchewan decision, **R. v. Harms** (1967, Sask. Mag. Ct.) but was cited with apparent approval in **R. v. Walker** (1982, Sask. Prov. Ct.). In **Walker**, however, there was a finding that the signal was seen, so the precise point did not arise. It is submitted that, whatever the state of the law in Saskatchewan, the holding in **R. v. Dileozenzo**; **R. v. Bancroft** (1983, Ont. C.A.) that the offence is one of strict liability means that the Crown is not obliged to prove that the defendant had knowledge of

the signal, but only that a movement that the reasonable person would recognize as a signal was made. It would then fall to the defendant to establish that he had made an honest and reasonable mistake of fact or that he had exercised due diligence but had failed to see the signal.

R. v. Ellis (1947), 88 C.C.C. 430 (Sask. Dist. Ct.)

R. v. Harms, [1967] 3 C.C.C. 93 (Sask. Mag. Ct.)

R. v. Walker (1982), 17 M.V.R. 154 (Sask. Prov. Ct.)

R. v. Brisson; R. v. Kennedy (1986), 37 M.V.R. 313 (Ont. C.A.)

R. v. Dilorenzo; R. v. Bancroft (1983), 48 M.V.R. 259 (Ont. C.A.)

R. v. Parton (1983), 25 M.V.R. 177, (Alta. Q.B.)

"Police Officer...Readily Identifiable As Such": The determination of whether a police officer is "readily identifiable as such" is objective. This requirement is an element of the offence, and the defendant's subjective knowledge that the individual is a police officer will not be sufficient in the absence of proof that the officer is readily identifiable.

R. v. Dilorenzo; R. v. Bancroft, (1983), 48 M.V.R. 259 (Ont. C.A.)

R. v. Bunting (1983), 48 M.V.R. 23 (B.C. Prov. Ct.)

In **R. v. Dilorenzo; R. v. Bancroft** (1983, Ont. C.A.) the court held that a police officer who was wearing a blue O.P.P. shirt with shoulder patches plainly visible, but no cross straps or hat, and was operating an unmarked police car would be "readily identifiable as such".

It would seem that a person operating a marked police vehicle will necessarily be "readily identifiable" as a police officer.

R. v. LeBlanc (1988), 4 M.V.R. (2d) 89 (N.B.Q.B.)

"Shall Immediately Come to a Safe Stop": It seems to be an element of the offence that the defendant's vehicle be moving at the time the signal or request is made.

R. v. Parton (1983), 25 M.V.R. 177 (Alta. Q.B.)

### **Escape By Flight: s. 216(3)**

Introduction: Section 216(3) does not create an offence, but relates to penalty and specifies circumstances where a three-year licence suspension must be ordered. The Ontario Court of Appeal has held that:



In sum, the scheme established by s. 189a [now s. 216] appears to be this. Subsection (1) furnishes a police officer acting in the lawful execution of his duties with a general power to stop a driver, and requires the driver to come to a stop when so requested by a police officer readily identifiable as such. Subsection (3) is aimed at aggravated examples of conduct covered by subs. (1) that arise in a police chase and, as a deterrent for those who would engage in the highly dangerous conduct involved in a police chase, prescribes a substantial licence suspension. A finding under subs. (3) may be made only following a conviction under subs. (2).

R. v. Dilorenzo; R. v. Bancroft (1984), 48 M.V.R. 259 (Ont. C.A.)

Nature of the Offence: In **R. v. Dilorenzo; R. v. Bancroft** (1983, Ont. C.A.), the court held that the use of the word "wilfully" in the section imported *mens rea* and required an intention to avoid the police. Moreover, the court held that despite the use of the word "satisfied" in the section, the standard of proof required for the mental element was proof beyond a reasonable doubt.

R. v. Dilorenzo; R. v. Bancroft (1983), 48 M.V.R. 259 (Ont. C.A.), overruling on this point;

R. v. Worth (1983), 21 M.V.R. 89 (Ont. Co.Ct.)

A mere failure to stop for a police officer, even when the defendant knows that they are being signalled to stop, is insufficient to satisfy the section. There must be proof of an intent to avoid the police, although this intent can be inferred from the conduct of the defendant and the manner of driving.

R. v. Martel (1987), 7 M.V.R. (2d) 33 (Ont. Dist.Ct.)

Furthermore, it would appear that conduct of the defendant other than his manner of driving may be considered in determining whether there was an "intention to avoid police". For instance, the inference of intent may be drawn where the defendant runs away from police after his car is stopped

R. v. Traves (1986), 43 M.V.R. 192 (Ont. Dist. Ct.)

Form of Charge: An allegation of the circumstances set out in s. 216(3) must be included in the information alleging the offence under ss. 216(1) and 216(2) if the Crown is seeking the penalty under s. 216(3).

R. v. Dilorenzo; R. v. Bancroft (1983), 48 M.V.R. 259 (Ont. C.A.)

In that case, the Ontario Court of Appeal referred with apparent approval to the following form of charge:



did commit the offence of failing to stop his motor vehicle when signalled or requested to stop by a police officer who was readily identifiable as such, contrary to subsections 216(1) and 216(2) of the Highway Traffic Act, and it is further alleged pursuant to subsection 216(3) of the said Act that John Doe did wilfully continue to avoid police while a police officer gave pursuit.

Nature of Sentence Provision: The penalty in s. 216(3) is a fixed penalty, and the Court has no discretion to impose a lesser suspension.

R. v. Dileo; R. v. Bancroft (1983), 48 M.V.R. 259 (Ont. C.A.) at 274

Multiple Convictions: In **R. v. Brisson**; **R. v. Kennedy**, (1986, Ont. C.A.), the court held that the rule against multiple convictions did not bar convictions for both the offence under s.216 where the aggravating circumstances in s. 216(3) were alleged and either careless driving under s. 130 of the **Highway Traffic Act** or dangerous driving under s. 249 of the **Criminal Code**. The court held that in each case the two offences involved different external and mental elements.

R. v. Brisson; R. v. Kennedy (1986), 37 M.V.R. 313 (Ont. C.A.)

See "Rule Against Multiple Convictions", in **General Principles and Defences**.

## LIQUOR LICENCE ACT

## TABLE OF CONTENTS

Licence or Permit Required for Sale: s. 5 .....	A6-1
Sale to Intoxicated Person: s. 29 .....	A6-1
Sale to Person under Nineteen: s. 30(1)(2) .....	A6-2
Classification .....	A6-2
Elements of Offence .....	A6-2
Proof of Actual Age .....	A6-2
Proof of Apparent Age .....	A6-3
Permitting Possession or Consumption: s. 39(3)(4) .....	A6-4
Possession or Consumption by Person Under Nineteen: s. 30(8) .....	A6-4
Definition of "Residence": s. 31(1) .....	A6-5
Unlawful Possession or Consumption: s. 31(2)(3) .....	A6-6
Intoxication: s.31(4) .....	A6-6
Private Place .....	A6-6
Meaning of "Intoxicated" .....	A6-7
Conveying Liquor in Vehicle: s. 32 .....	A6-8
Removing Person from Premises: s. 34 .....	A6-8
Arrest Without Warrant: s. 48 .....	A6-9
Offences: s. 61 .....	A6-9



**LIQUOR LICENCE ACT****Licence or Permit Required for Sale: s. 5**

Note that "sell" and "sale" are statutorily defined in s. 1 of the **Liquor Licence Act**.

Section 5(2) refers to "orders". In **R. v. Roche** (1934, N.S.S.C.A.D.) the court considered a similar provision of the Nova Scotia **Liquor Control Act**. While the case is not entirely clear, it would appear to hold that taking a single order does not of itself constitute taking *orders*, although it might provide evidence in support of such a charge. *Quaere* if the same result would be reached in light of s. 27(j) of the Ontario **Interpretation Act**?

**R. v. Roche** (1934), 62 C.C.C. 11 (N.S.S.C.A.D.)

The burden of proving the existence of a licence or permit to sell liquor falls on the defendant, as it is an "exception, exemption, excuse or promise" within the meaning of s. 48 of the **Provincial Offences Act**: compare **R. v. Park Hotel (Sudbury) Ltd.** (1966, Ont. Dist. Ct.). This onus would appear not to violate s. 11(d) of the **Charter**: see **R. v. Schwartz** (1988, S.C.C.).

**R. v. Park Hotel (Sudbury) Ltd.**, [1966] 4 C.C.C. 158, 2 O.R. 316 (Ont. Dist. Ct.)

**R. v. Schwartz** (1988), 45 C.C.C. (3d), 66 C.R. (3d) 251 (S.C.C.)

**Sale to Intoxicated Person: s. 29**

A series of cases prior to 1977 considered the classification of this offence. While these cases must be read with caution in light of the three-fold categorization of offences

in **R. v. City of Sault Ste. Marie**, it would appear from **R. v. Royal Canadian Legion** (1971, Ont. C.A.) and **R. v. Dovco Holdings Ltd.** (1977, Ont. Div. Ct.) that the offence is properly classified as being one of strict liability. This holding is further supported by the penalties provided in s. 61 of the **Liquor Licence Act**.

**R. v. City of Sault Ste. Marie** (1977), 40 C.C.C. (2d) 353, [1978] 2 S.C.R. 1299 (S.C.C.)

**R. v. Royal Canadian Legion** (1971), 4 C.C.C. (2d) 196 (Ont. C.A.)

**R. v. Dovco Holdings Ltd.** (1977), 34 C.C.C. (2d) 317 (Ont. Div. Ct.)

For the meaning of "intoxicated", see the annotations to s. 31(4), below.

**Sale to Person Under Nineteen: s. 30(1),(2)**

Classification: The offence created by s. 30(2) is an offence of strict liability.

R. v. Boardman (1979), 47 C.C.C. (2d) 334 (Ont. Dist. Ct.)

R. v. Kazia (1978), 2 W.C.B. 452 (Ont. Div. Ct.)

The offence under s. 30(1) requires that the defendant have actual knowledge that the person to whom he sold liquor was under nineteen years of age.

R. v. Boardman, (1979), 47 C.C.C. (2d) 334 (Ont. Dist. Ct.)

Elements of the Offence: The offence under s. 30(1) requires proof that the person to whom liquor was sold was in fact under nineteen years of age. In contrast, the age of the customer is not an element of the offence under s. 30(2), and a defendant may be convicted of the offence even if the customer is actually nineteen years of age or older.

R. v. Boardman (1979), 47 C.C.C. (2d) 334 (Ont. Dist. Ct.)

Proof of Actual Age: In a prosecution under s. 30(1), the Crown must prove the actual age of the person who was supplied with liquor.

Since the issue here is not the age of the defendant but that of another person, the reasoning in **R. v. Peacock** (discussed below under "Possession or Consumption by Person Under Nineteen: s. 30(8)") will not apply.

One way to prove age would be to use s. 42 of the **Vital Statistics Act**, R.S.O. 1980, c. 524. Note that it will still be necessary to prove that the purchaser is the same as the person referred to in the certificate; presumably this could be done by using the similarity of names and the possession over time of the birth certificate by the purchaser.

Another possibility is to have the purchaser testify directly as to his age. While such evidence is technically hearsay (since a person would have to rely on others to know the date of his birth), it was held in **R. v. Lachapelle** (1977, Que. C.A.) that excluding such evidence on this basis would be "grotesque", and that the evidence is not only admissible but also generally the best possible evidence. It is submitted that the reasoning in this decision is persuasive and that **R. v. Linnerth** (1957, Ont. H.C.), to the extent that it is inconsistent with it, should not be followed (note that Ewaschuk J. in **Claiborne Industries v. National Bank of Canada** (1986, Ont. H.C.) cites **Lachapelle** with apparent approval but appears to misunderstand the *ratio* of the decision in doing so).



A third possibility, of course, will be to call a person who was present at the customer's birth.

Documentation that would satisfy the requirements of s. 30(6) cannot be used by the Crown to prove actual age.

R. v. Lachapelle (1977), 38 C.C.C. (2d) 369 (Que. C.A.)

R. v. Linnerth (1957), 119 C.C.C. 395 (Ont. H.C.)

Claiborne Industries v. National Bank of Canada (1986), 28 D.L.R. (4th) 695 (Ont. H.C.)

Proof of Apparent Age: As noted above, s. 30(2) prohibits the sale or supply of liquor to a person under the apparent age of nineteen years, regardless of the person's actual age. The Crown is therefore required to prove, as part of its case, the apparent age of the person at the time of the offence. In **R. v. Boardman**, (1979, Ont. Dist. Ct.), the court held that the evidence of a person that he was seventeen years old, together with the police officer's bare evidence that he was apparently under the age of nineteen years, amounted to "really no evidence" of apparent age. It would appear that the Crown must adduce, as part of its case, evidence of the factors that the witness observed and that led him to conclude that the person was apparently under the age of nineteen. These might include height, weight, complexion, physical development, dress, demeanour, facial hair (or lack thereof), voice, vocabulary, and so forth.

The court in **Boardman** also considered the effect of s. 45(2) [the predecessor to s. 30(7)]. The former section provided that "...in any prosecution for a contravention of this subsection, the justice shall determine from the appearance of such person and other relevant circumstances whether he is apparently under the age of nineteen years" (note that the new provision, s. 30(7), is permissive and not mandatory). While Borins D.C.J. criticized this provision for making the trial judge a witness, it is respectfully submitted that this criticism is inappropriate. It will be a question of fact whether the person is apparently under the age of nineteen. There is no reason why the trial judge should not use visual evidence (the physical appearance of the person) as well as oral evidence (the testimony of witnesses) in resolving this. Of course, in doing so the trial judge should be aware of any differences in appearance between the person at the time of trial and the person at the time of the alleged offence.

R. v. Boardman (1979), 47 C.C.C. (2d) 334 (Ont. Dist. Ct.)

An earlier version of s. 30(2) (S.O. 1946, c. 46, s. 50(2)) only made the "sale", and not the "supply", an offence. In **R. v. Tyler** (1950, Ont. Co. Ct.) six cocktails were sold to one member of a group of six people and were then consumed by the group, one of whom was apparently underage. It was held that the only sale was to the person who paid, and therefore the offence was not made out. It would appear, however, that the offence of "supplying" would be made out in such a situation.

**R. v. Tyler** (1950), 97 C.C.C. 383 (Ont. Co. Ct.)

Note that s. 30(6) provides a statutory defence of reliance on prescribed documentation to the offences created by ss. 30(2) and 30(4) where there is no reason to doubt the authenticity of the documentation or that it was issued to the person producing it.

Note also the minimum penalties prescribed for a violation of ss. 30(1) or 30(2) in ss. 61(5), 61(6) and 61(7).

#### **Permitting Possession or Consumption: s. 30(3),(4)**

For a discussion of the classification of these offences and the elements needed to be proved by the Crown with respect to the age of the person, see the discussion under "Sale to Person Under Nineteen", above.

#### **Possession or Consumption by Person Under Nineteen: s. 30(8)**

In **R. v. Stephens** (1959, Ont. Co. Ct.) the defendant was charged with "obtaining" liquor. The evidence was that he had previously consumed liquor. The court held that in order to establish the offence there must be something more than simply evidence that the defendant had consumed liquor; in order for the liquor to have been "obtained" there had to be some conscious effort put forth by the defendant to bring it into his possession. Note, however, that the version of the section then in force did not make the "having" or "consuming" of liquor by a minor an offence.

**R. v. Stephens**, [1960] O.W.N. 63 (Co. Ct.)

The Crown must prove the actual age of the defendant as an element of its case. In addition to the methods of proof discussed under "Sale to Person Under Nineteen" above. It was held in **R. v. Peacock** (1968, Ont. Co. Ct.) that an admission by a defendant as to his age (at least where the admission is against his interest) is admissible as *prima facie* proof of age. While such a statement is clearly based on hearsay, there is now high authority that an admission based on hearsay may be admissible to prove the truth of the fact asserted if it is adopted by the defendant: see **R. v. Streu** (1989, S.C.C.)

R. v. Peacock, [1968] 1 O.R. 698, 3 C.R.N.S. 103 (Ont. Co. Ct.)

R. v. Streu (1989), 48 C.C.C. (3d) 321 (S.C.C.)

### **Definition of "Residence": s. 31(1)**

In **R. v. Doughty** (1968, Ont. Mag. Ct.) it was held that a vessel to be a residence must be exclusively in the control of the owner, lessee or tenant and/or his invitees and must be capable of being used for human habitation, i.e. it must be capable of affording protection from the elements and privacy for the occupants where they may eat, drink, and sleep. It must also be or have been so used at some point, but need not at all times be immediately capable of providing all these facilities, nor need it be the occupant's only residence. It should be noted, however, that the statute then in force (see R.S.O. 1970, c. 249, s. 1(1)(20)(iv) specifically included "vessel" within the definition of "residence". There may now be issue as to whether a "vessel" can be a "place" within the meaning of the current s. 31(1).

R. v. Doughty (1968), 5 C.R.N.S. 98 (Ont. Mag.Ct.)

Even if a boat is not a residence it may under certain circumstances be a "private place" within the meaning of s. 31(2)(c): see O. Reg. 547/90, s. 3.

A person may have more than one residence if, in fact, he resides in more than one place.

R. v. Mark Park (1920), 34 C.C.C. 203 (Ont. S.C.)

It would appear that the inclusion in the definition of "residence" of "all premises used in conjunction with the place to which the general public is not invited or permitted access" means that common areas and hallways in apartment buildings (except perhaps a front lobby) and university residences will fall within the definition. Note that the definition of "residence" is narrowed in the offence of being in an intoxicated condition (s. 31(4)).

**Unlawful Possession or Consumption: s. 31(2)(3)**

For the meaning of "private place", see O. Reg. 547/90, s. 3.

The exception in s. 31(3) permits the possession of liquor in places other than those set out in s. 31(2) provided that the liquor is in a "closed container". It is submitted that "container" refers to the bottle, can, or other container that holds the liquor itself and does not refer to the case or other packaging within which these items are sold (see the annotation to s. 32(2)). Note also that this section refers to "closed" containers and not "sealed" containers (compare s. 32(2)). It would appear that a part bottle of liquor, if recapped, falls within the exception.

The predecessor to this section required that the liquor be "in a closed container and the container is not displayed to public view". The second requirement is omitted from the new legislation.

**Intoxication: s. 31(4)**

"Private Place": While the predecessor to this section referred in part to being intoxicated "in a public place", the definition of "public place" in s. 45(1)(a) was similar to the words of the current s. 31(4)(a). It remains to be seen whether the omission of the words "whether or not for a fee" in the current statute will make any difference.

The question of whether a motor vehicle can be a "public place" has been considered in several cases interpreting the provisions of the **Criminal Code** in relation to sexual offences and prostitution. It is submitted that the cases, and in particular **R. v. Wise** (1982, B.C. Co. Ct.), that have interpreted a motor vehicle to be a "public place" when it is itself in a public place, are of very little assistance in interpreting the **Liquor Licence Act**. First, the **Criminal Code** definition in its use of the word "includes" is much broader than that of the **Liquor Licence Act**. Second, the policy interests at stake are much different.

In **McKibbin v. Caldwell** (1949, Ont. Co. Ct.) it was held that a private motor vehicle in operation on a highway was not a "public place".

It appears that public transportation systems, such as buses, streetcars, and subways, are not private places within the meaning of s. 31(4)(a). The question of whether a taxi is a "private place" is somewhat more difficult. In **R. v. Austin** (1942, Alta. C.A.) a conviction was quashed where the defendant had been intoxicated in a taxi, but the result was based on the lack of evidence that the public had access to it at the time of the offence. It is submitted that there are good policy reasons for



excluding taxis from the s. 31(4)(a) offence. Unlike other modes of public transportation, intoxicated persons in taxis are unlikely to create any danger, annoyance or nuisance to members of the public. Further, it is in the interests of society that intoxicated persons have a lawful means of returning home. If a person who took a taxi could be charged with this offence, there is an incentive for him to take his own vehicle instead. Encouraging drinking and driving can hardly be in the public interest.

R. v. Wise (1982), 67 C.C.C. (2d) 231 (B.C. Co. Ct.)

McKibbin v. Caldwell (1949), 97 C.C.C. 128 (Ont. Co. Ct.)

R. v. Austin (1942), 79 C.C.C. 83 (Alta. C.A.)

Meaning of "Intoxicated": The meaning of "intoxicated" was considered in **R. v. Modeste** (1959, N.W.T.T.C.), where the court rejected the view that the consumption of any amount of alcohol automatically rendered a defendant intoxicated, and held that what was required was proof of a "marked departure from normal" in a defendant's condition. This case was subsequently cited with approval in **R. v. Tisdale** (Alta. Mag.C.), where the court held that "a very considerable degree of drunkenness" would be required.

The various cases on the issue, and the considerations of public policy that underlie the statute, were reviewed at length by O'Hearn Co. Ct. J. in **R. v. Morris** (1979, N.S. Co. Ct.). After noting in particular the power to arrest for commission of the offence (see s. 31(5) of the Ontario L.L.A.) he described the degree of intoxication necessary for the offence to be committed as (at 221):

intoxication where there was a real possibility that the accused might cause injury to himself or be a danger, nuisance or disturbance to others, or that he might be unable to take care of himself, or would cause scandal to young people, or where, in fact, any of these dangers had been or was being realized.

It is submitted that this would be equally applicable in Ontario.

R. v. Modeste (1959), 127 C.C.C. 197 (N.W.T.T.C.)

R. v. Tisdale (1971), 13 C.R.N.S. 120 (Alta. Mag. C.)

R. v. Morris (1979), 35 N.S.R. (2d) 211 (N.S. Co. Ct.)



**Conveying Liquor In Vehicle: s. 32**

The exceptions to the prohibition in s. 32(1) are contained in s. 32(2). Note that unlike s. 31(3), s. 32(2)(a) requires that the container be unopened and the seal be unbroken: the container must not simply be closed, but must never have been opened. The section previously referred to a "bottle or package" rather than "container", and under this wording it was held in **R. v. Vallee** (1980, Ont. H.C.) that the offence was not made out where the defendant was transporting an open case of beer where all the bottles in the case were either empty or unopened. Similar results have been reached in other provinces: see **R. v. Kelly** (1963, Alta. Dist. Ct.) and **R. v. Crane** (1955, Nfld. Dist. Ct.). The change in wording would seem to make the reasoning in these cases, if anything, stronger. (Note also that it is now possible to buy individual bottles of beer at some Brewer's Retail outlets, so beer does not always come in a second sealed package.)

*R. v. Vallee* (1980), unreported, Ont. H.C., noted in J. Arvay "Carrying an Open Case of Beer" (1980), 15 C.R. (3d) 386

*R. v. Kelly* (1963), 42 C.R. 346 (Alta. Dist. Ct.)

*R. v. Crane* (1985), 55 Nfld. & P.E.I.R. 340 (Nfld. Dist. Ct.)

The exception in s. 34(2)(b) allows one to transport liquor which may be unsealed (and presumably opened) as long as the liquor is "packed in baggage that is fastened closed" or as long as the liquor is "not otherwise readily available to any person in the vehicle". An open, unsealed bottle of liquor stored in the rear area of a station wagon, for example, would not be an offence if the driver, to whom it would not be readily accessible, was the sole occupant, but would be an offence if a passenger situated behind the driver did have ready access to the liquor. The mischief to which this section is directed is clearly the unlawful consumption of liquor in a motor vehicle. By strictly regulating the means of conveyance, this section attempts to remove the temptation to consume liquor in a motor vehicle.

**Removing Person from Premises: s. 34**

Note that s. 34(1) places a duty on the holder of a licence or permit while s. 34(2) gives to the holder the powers necessary to carry out that duty.

While a series of cases prior to **R. v. Sault Ste. Marie** considered the interpretation of this section, it would seem that the offence created would now be held to be one of strict liability, particularly in view of the penalties provided in s. 61(3) of the Act.

*R. v. City of Sault Ste. Marie* (1977), 40 C.C.C. (2d) 353 (S.C.C.)

**Arrest Without Warrant: s. 48**

This section requires that a person be "apparently in contravention" of the Act. In **R. v. Kelly** (1969, Ont. C.A.) it was held under an earlier version of this section that an odour of liquor on the breath of the defendant, a minor, would not establish that he was committing the offence of consuming alcohol in the absence of any information as to when or where the liquor was consumed. *Quaere* in any event whether the past commission of an offence comes within the section, or whether the defendant must actually be committing an offence at the time he is found by the police officer.

R. v. Kelly, [1970] 2 O.R. 415, 16 C.R.N.S. 72 (Ont. C.A.)

Note that the section refers to a "police officer" and not a "peace officer". The term "police officer" is defined in the **Provincial Offences Act**, s. 1(1)(f).

**Offences: s. 61**

Note the minimum penalty provisions of s. 61(6) and s. 61(7), which apply to the offences under s. 30(1), (2), (3) and (4).



**MOTORIZED SNOW VEHICLES' ACT**

No Cases

No Comments





**TRESPASS TO PROPERTY ACT**

<b>Trespass an Offence: s. 2</b> .....	A8-1
General .....	A8-1
Charter Issues .....	A8-1
<b>Prohibition of Entry: s. 3</b> .....	A8-1
General .....	A8-1
Right to Prohibit Entry .....	A8-2
<b>Method of Giving Notice: s. 5</b> .....	A8-2

S3-A8-ii

## STATUTES

**TRESPASS TO PROPERTY ACT****Trespass an Offence: s. 2**

General: The **T.P.A.** applies to property owned by the federal Crown and is not rendered inoperative on division of powers grounds, since it is a law of general application that does not purport to regulate the use that may be made of the property.

R. v. Clouston (1986), 16 W.C.B. 287 (Ont. Dist. Ct.)

On a charge under s. 2(1)(a) there is no onus on the Crown to prove an occupier of the property in question once it has established (i) that the defendant was not acting under a right or authority conferred by law, (ii) that the defendant entered on the premises and (iii) that entry on the premises was prohibited under the Act. The onus of adducing evidence of the express permission of the occupier lies on the defendant (but see "Charter Issues", below).

R. v. Clouston (1986), 16 W.C.B. 287 (Ont. Dist. Ct.)

Charter Issues: There is some question as to the constitutionality of the evidential burden placed on the defendant by s. 2(1)(a) of the **T.P.A.** In **R. v. Clouston** (1986, Ont. Dist. Ct.) the court held that this burden did not violate the presumption of innocence contained in s. 11(d) of the **Charter** but in **Re R. and K.** (1988, Ont. Prov. Ct.) it was held (without reference to **Clouston**) that the burden did violate s. 11(d).

It should be noted that there are two s. 11(d) issues raised by the section: (i) whether placing *any* onus on the defendant to adduce permission violates s. 11(d) and, if the answer to this is "no", (ii) whether placing the onus on the defendant to establish permission on a balance of probabilities violates s. 11(d). With respect to the first question, it is submitted that since the Crown is required to prove that entry is prohibited under the Act, it is not offensive to place the onus on the defendant to adduce some evidence of permission. With respect to the second point, it is submitted in light of the recent decisions of the Supreme Court of Canada in **R. v. Holmes** (1988, S.C.C.), **R. v. Whyte** (1988, S.C.C.), and **R. v. Keegstra** (1990, S.C.C.) that the placing of the burden on the defendant on a balance of probabilities violates s. 11(d) and the real issue is whether such an onus can be justified under s. 1 of the **Charter**.

**Prohibition of Entry: s. 3**

General: It appears that sheds and outbuildings are within the category of premises into which entry is prohibited without notice under s. 3(1)(b).

R. v. Moran (1987), 21 O.A.C. 257, 36 C.C.C. (3d) 225 (Ont. C.A.)

Right to Prohibit Entry: Both at common law and under the **T.P.A.**, a landowner has the exclusive right to decide who is allowed to enter or remain on his or her land. The landowner is not compelled to give a reason when a visitor is asked to leave the land. This principle is not limited to private landowners, but extends to those who invite the general public onto their land.

Russo v. Ontario Jockey Club (1987), 62 O.R. (2d) 731 (Ont. H.C.J.)

Harrison v. Carswell, [1976] 2 S.C.R. 200, 25 C.C.C. (2d) 186 (S.C.C.)

The actions of a landowner who denies access to a particular individual while extending an invitation to the public at large to enter the property are private actions, and do not fall within the scope of s. 32 of the **Charter**. Accordingly, the **Charter** has no application to such actions.

Russo v. Ontario Jockey Club (1987), 62 O.R. (2d) 731 (Ont. H.C.)

However, where the invitation of the **T.P.A.** has the effect of infringing on a right or freedom guaranteed under the **Charter**, and the infringement cannot be justified under s. 1 of the **Charter**, the **T.P.A.** will be rendered unconstitutional to the extent of the inconsistency by s. 52(1) of the **Constitution Act, 1982**. The determination as to when this has occurred will depend on the facts and circumstances of the particular case.

R. v. Layton (1986), 38 C.C.C. (3d) 550 (Ont. Prov. Ct.)

The principle that an owner of land has an absolute right to withdraw an invitation to any member of the general public does not extend to an occupier or person in charge of a publicly-owned facility.

R. v. E.B.M. (1988), 4 W.C.B. (2d) 401 (Ont. Prov. Ct.)

### **Method of Giving Notice: s. 5**

Where a sign is posted at only one of several access points to the property, the test of "substantial compliance" has not been met.

Evans v. Latulippe (1990), 38 O.A.C. 295 (Div. Ct.)







**STATUTES****TABLE OF CONTENTS**

CHARTER OF RIGHTS AND FREEDOMS .....	S1-1
EVIDENCE ACT (ONTARIO) .....	S2-1
INTERPRETATION ACT (ONTARIO) .....	S3-1
PROVINCIAL OFFENCES ACT .....	S4-1
REGULATIONS ACT (ONTARIO) .....	S5-1



## CHARTER OF RIGHTS AND FREEDOMS

### Guarantee of Rights and Freedoms

#### Rights and freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

### Fundamental Freedoms

#### Fundamental freedoms

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

### Democratic Rights

#### Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

End of document.

#### Maximum duration of legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members. (2) In time of real or apprehended war, invasion or insurrection, a

House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

#### Annual sitting of legislative bodies

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

#### Mobility Rights

##### Mobility of citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a



province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

### Legal Rights

#### Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

#### Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

#### Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

#### Arrest or detention

10. Everyone has the right on arrest or detention

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

#### Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an

offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

#### Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

### Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

### Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

## Equality Rights

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

## Official Languages of Canada

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of

Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

#### Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

#### Parliamentary statutes and records

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

#### Proceedings in courts established by Parliament

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

### Communications by public with federal institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

### Continuation of existing constitutional provisions

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

### Rights and privileges preserved

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.



## Minority Language Educational Rights

## Language of instruction

## 23. (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

## Enforcement

### Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

## General

### Aboriginal rights and freedoms not affected by Charter

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

### Other rights and freedoms not affected by Charter

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

### Multicultural heritage

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

### Rights guaranteed equally to both sexes

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

### Rights respecting certain schools preserved

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

### Application to territories and territorial authorities

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

### Legislative powers not extended

31. Nothing in this Charter extends the legislative powers of any body or authority.

## Application of Charter

## Application of Charter

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

## Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

Citation

34. This Part may be cited as the Canadian Charter of Rights and Freedoms.



## Evidence Act

### Definitions

1. In this Act,

"action" includes an issue, matter, arbitration, reference, investigation, inquiry, a prosecution for an offence committed against a statute of Ontario or against a by-law or regulation made under any such statute and any other proceeding authorized or permitted to be tried, heard, had or taken by or before a court under the law of Ontario; ("action")

"court" includes a judge, arbitrator, umpire, commissioner, justice of the peace or other officer or person having by law or by consent of parties authority to hear, receive and examine evidence. ("tribunal") R.S.O. 1980, c. 145, s. 1.

### Application of Act

2. This Act applies to all actions and other matters whatsoever respecting which the Legislature has jurisdiction. R.S.O. 1980, c. 145, s. 2.

### Administration of oaths and affirmations

3.--(1) Where by any Act of the Legislature or order of the Assembly an oath or affirmation is authorized or directed to be administered, the oath or affirmation may be administered by any person authorized to take affidavits in Ontario.

### by courts

(2) Every court has power to administer or cause to be administered an oath or affirmation to every witness who is called to give evidence before the court. R.S.O. 1980, c. 145, s. 3, *revised*.

## Certification

4. Where an oath, affirmation or declaration is directed to be made before a person, he or she has power and authority to administer it and to certify to its having been made. R.S.O. 1980, c. 145, s. 4, *revised*.

## Recording of evidence, etc.

5.--(1) Despite any Act, regulation or the rules of court, a stenographic reporter, shorthand writer, stenographer or other person who is authorized to record evidence and proceedings in an action in a court or in a proceeding authorized by or under any Act may record the evidence and the proceedings by any form of shorthand or by any device for recording sound of a type approved by the Attorney General.

## Admissibility of transcripts

(2) Despite any Act or regulation or the rules of court, a transcript of the whole or a part of any evidence that has or proceedings that have been recorded in accordance with subsection (1) and that has or have been certified in accordance with the Act, regulation or rule of court, if any, applicable thereto and that is otherwise admissible by law is admissible in evidence whether or not the witness or any of the parties to the action or proceeding has approved the method used to record the evidence and the proceedings and whether or not he or she has read or signed the transcript. R.S.O. 1980, c. 145, s. 5.

## Witnesses, not incapacitated by crime, etc.

6. No person offered as a witness in an action shall be excluded from giving evidence by reason of any alleged incapacity from crime or interest. R.S.O. 1980, c. 145, s. 6.

## Admissibility notwithstanding interest or crime

7. Every person offered as a witness shall be admitted to give evidence although he or she has an interest in the matter in question or in the event of

the action and although he or she has been previously convicted of a crime or offence. R.S.O. 1980, c. 145, s. 7.

#### Evidence of parties

8.--(1) The parties to an action and the persons on whose behalf it is brought, instituted, opposed or defended are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of themselves or of any of the parties, and the husbands and wives of such parties and persons are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of any of the parties.

#### Evidence of husband and wife

(2) Without limiting the generality of subsection (1), a husband or a wife may in an action give evidence that he or she did or did not have sexual intercourse with the other party to the marriage at any time or within any period of time before or during the marriage. R.S.O. 1980, c. 145, s. 8.

#### Witness not excused from answering questions tending to criminate

9.--(1) A witness shall not be excused from answering any question upon the ground that the answer may tend to criminate the witness or may tend to establish his or her liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature.

#### Answer not to be used in evidence against witness

(2) If, with respect to a question, a witness objects to answer upon any of the grounds mentioned in subsection (1) and if, but for this section or any Act of the Parliament of Canada, he or she would therefore be excused from answering such question, then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him or her in any civil proceeding or in any proceeding under any Act of the Legislature. R.S.O. 1980, c. 145, s. 9.

### Evidence in proceedings in consequence of adultery

10. The parties to a proceeding instituted in consequence of adultery and the husbands and wives of such parties are competent to give evidence in such proceedings, but no witness in any such proceeding, whether a party to the suit or not, is liable to be asked or bound to answer any question tending to show that he or she is guilty of adultery, unless such witness has already given evidence in the same proceeding in disproof of his or her alleged adultery. R.S.O. 1980, c. 145, s. 10.

### Communications made during marriage

11. A husband is not compellable to disclose any communication made to him by his wife during the marriage, nor is a wife compellable to disclose any communication made to her by her husband during the marriage. R.S.O. 1980, c. 145, s. 11.

### Expert evidence

12. Where it is intended by a party to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without the leave of the judge or other person presiding. R.S.O. 1980, c. 145, s. 12.

### Actions by or against heirs, etc.

13. In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. R.S.O. 1980, c. 145, s. 13.

### Actions by or against persons under disability

14. In an action by or against a mentally incompetent person so found, or a patient in a psychiatric facility, or a person who from unsoundness of mind is

incapable of giving evidence, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence, unless such evidence is corroborated by some other material evidence. R.S.O. 1980, c. 145, s. 14.

#### Use of examination for discovery of officer or employee of corporation at trial

15. An examination for discovery, or any part thereof, of an officer or employee of a corporation made under the rules of court may be used as evidence at the trial by any party adverse in interest to the corporation, subject to such protection to the corporation as the rules of court provide. R.S.O. 1980, c. 145, s. 15.

#### Mode of administering oath

16. Where an oath may be lawfully taken, it may be administered to a person while such person holds in his or her hand a copy of the Old or New Testament without requiring him or her to kiss the same, or, when the person objects to being sworn in this manner or declares that the oath so administered is not binding upon the person's conscience, then in such manner and form and with such ceremonies as he or she declares to be binding. R.S.O. 1980, c. 145, s. 16.

#### Affirmation in lieu of oath

17.--(1) Where a person objects to being sworn from conscientious scruples, or on the ground of his or her religious belief, or on the ground that the taking of an oath would have no binding effect on the person's conscience, he or she may, in lieu of taking an oath, make an affirmation or declaration that is of the same force and effect as if the person had taken an oath in the usual form.

#### Certifying affirmation

(2) Where the evidence is in the form of an affidavit or written deposition, the person before whom it is taken shall certify that the deponent satisfied



him or her that the deponent was a person entitled to affirm. R.S.O. 1980, c. 145, s. 17.

#### Evidence of child

18.--(1) In any legal proceeding where a child of tender years is offered as a witness and the child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of the child may be received though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

#### Corroboration

(2) No case shall be decided upon such evidence unless it is corroborated by some other material evidence. R.S.O. 1980, c. 145, s. 18.

#### Attendance of witnesses

19. A witness served in due time with a summons issued out of a court in Ontario, and paid proper witness fees and conduct money, who makes default in obeying such summons, without any lawful and reasonable impediment, in addition to any penalty he or she may incur as for a contempt of court, is liable to an action on the part of the person by whom, or on whose behalf, he or she has been summonsed for any damage that such person may sustain or be put to by reason of such default. R.S.O. 1980, c. 145, s. 19.

*[The following provisions were enacted by the Province of Canada as part of Chapter 9 of 1854. They were carried into the Consolidated Statutes of Canada, 1859 as sections 4-11 and 13 of Chapter 79. They have appeared in their present form in successive revisions since Confederation. They are revised in the Revised Statutes of Ontario to provide for gender-neutrality and to include a French version. See Rideout vs Rideout (1956) O.W.N. 644].*

Courts may issue subpoenas to any part of Canada

4. If in any action or suit depending in any of Her Majesty's Superior Courts of Law or Equity in Canada, it appears to the Court, or when not sitting, it appears to any Judge of the Court that it is proper to compel the personal attendance at any trial or *enquête* or examination of witnesses, of any person who may not be within the jurisdiction of the Court in which the action or suit is pending, the Court or Judge, in their or his or her discretion, may order that a writ called a writ of *subpoena ad testificandum* or of *subpoena duces tecum* shall issue in special form, commanding such person to attend as a witness at such trial or *enquête* or examination of witnesses wherever he or she may be in Canada.

Service thereof in any part of Canada to be good

5. The service of any such writ or process in any part of Canada, shall be valid and effectual to all intents and purposes, as if the same had been served within the jurisdiction of the Court from which it has issued, according to the practice of such Court.

When not to be issued

6. No such writ shall be issued in any case in which an action is pending for the same cause of action, in that section of the Province, whether Upper or Lower Canada respectively, within which such witness or witnesses may reside.

Writs to be specially noted

7. Every such writ shall have at the foot, or in the margin thereof, a statement or notice that the same is issued by the special order of the Court or Judge making such order, and no such writ shall issue without such special order.

## Consequences of disobedience

8. In case any person so served does not appear according to the exigency of such writ or process, the Court out of which the same issued, may, upon proof made of the service thereof, and of such default to the satisfaction of such Court, transmit a certificate of such default, under the seal of the same Court, to any of Her Majesty's Superior Courts of Law or Equity in that part of Canada in which the person so served may reside, being out of the jurisdiction of the Court transmitting such certificate, and the Court to which such certificate is sent, shall thereupon proceed against and punish such person so having made default, in like manner as they might have done if such person had neglected or refused to appear to a writ of subpoena or other similar process issued out of such last mentioned Court.

## If expenses paid or tendered

9. No such certificate of default shall be transmitted by any Court, nor shall any person be punished for neglect or refusal to attend any trial or *enquête* or examination of witnesses, in obedience to any such subpoena or other similar process, unless it be made to appear to the Court transmitting and also to the Court receiving such certificate, that a reasonable and sufficient sum of money, according to the rate *per diem* and per mile allowed to witnesses by the law and practice of the Superior Court of Law within the jurisdiction of which such person was found, to defray the expenses of coming and attending to give evidence and of returning from giving evidence, had been tendered to such person at the time when the writ of subpoena, or other similar process was served upon him or her.

## How service proved

10. The service of such writs of subpoena or other similar process, in Lower Canada, shall be proved by the certificate of a Bailiff within the jurisdiction where the service has been made, under his or her oath of office, and such service in Upper Canada by the affidavit of service endorsed on or annexed to such writ by the person who served the same.

### Costs of attendance provided for

11. The costs of the attendance of any such witness shall not be taxed against the adverse party to such suit, beyond the amount that would have been allowed on a commission *rogatoire*, or to examine witnesses unless the Court or Judge before whom such trial or *enquête* or examination of witnesses is had, so orders.

. . . . .

### Power to issue commissions to examine witnesses preserved

13. Nothing herein contained shall affect the power of any Court to issue a commission for the examination of witnesses out of its jurisdiction, nor affect the admissibility of any evidence at any trial or proceeding, where such evidence is now by law receivable, on the ground of any witness being beyond the jurisdiction of the Court.

### Examination of witnesses, proof of contradictory written statements

20. A witness may be cross-examined as to previous statements made by him or her in writing, or reduced into writing, relative to the matter in question, without the writing being shown to the witness, but, if it is intended to contradict the witness by the writing, his or her attention shall, before such contradictory proof is given, be called to those parts of the writing that are to be used for the purpose of so contradicting the witness, and the judge or other person presiding at any time during the trial or proceeding may require the production of the writing for his or her inspection, and may thereupon make such use of it for the purposes of the trial or proceeding as he or she thinks fit. R.S.O. 1980, c. 145, s. 20.

### Proof of contradictory oral statements

21. If a witness upon cross-examination as to a former statement made by him or her relative to the matter in question and inconsistent with his or her present testimony does not distinctly admit that he or she did make such statement, proof may be given that the witness did in fact make it, but before



such proof is given the circumstances of the supposed statement sufficient to designate the particular occasion shall be mentioned to the witness, and the witness shall be asked whether or not he or she did make such statement. R.S.O. 1980, c. 145, s. 21.

#### Proof of previous conviction of a witness

**22.--(1)** A witness may be asked whether he or she has been convicted of any crime, and upon being so asked, if the witness either denies the fact or refuses to answer, the conviction may be proved, and a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted, or by the deputy of the officer, is, upon proof of the identity of the witness as such convict, sufficient evidence of the conviction, without proof of the signature or of the official character of the person appearing to have signed the certificate.

#### Fee

(2) For such certificate, a fee of \$1 and no more may be demanded or taken. R.S.O. 1980, c. 145, s. 22.

#### How far a party may discredit his or her own witness

**23.** A party producing a witness shall not be allowed to impeach his or her credit by general evidence of bad character, but the party may contradict the witness by other evidence, or, if the witness in the opinion of the judge or other person presiding proves adverse, such party may, by leave of the judge or other person presiding, prove that the witness made at some other time a statement inconsistent with his or her present testimony, but before such last-mentioned proof is given the circumstances of the proposed statement sufficient to designate the particular occasion shall be mentioned to the witness and the witness shall be asked whether or not he or she did make such statement. R.S.O. 1980, c. 145, s. 23.



## Letters patent

**24.** Letters patent under the Great Seal of the United Kingdom, or of any other of Her Majesty's dominions, may be proved by the production of an exemplification thereof, or of the enrolment thereof, under the Great Seal under which such letters patent were issued, and such exemplification has the like force and effect for all purposes as the letters patent thereby exemplified or enrolled, as well against Her Majesty as against all other persons whomsoever. R.S.O. 1980, c. 145, s. 24.

## Copies of statutes, etc.

**25.** Copies of statutes, official gazettes, ordinances, regulations, proclamations, journals, orders, appointments to office, notices thereof and other public documents purporting to be printed by or under the authority of the Parliament of the United Kingdom, or of the Imperial Government or by or under the authority of the government or of any legislative body of any dominion, commonwealth, state, province, colony, territory or possession within the Queen's dominions, shall be admitted in evidence to prove the contents thereof. R.S.O. 1980, c. 145, s. 25 (1).

## Proclamations, orders, etc.

**26.** Evidence of a proclamation, order, regulation or appointment to office made or issued,

- (a) by the Governor General or the Governor General in Council, or other chief executive officer or administrator of the Government of Canada; or
- (b) by or under the authority of a minister or head of a department of the Government of Canada or of a provincial or territorial government in Canada; or
- (c) by a Lieutenant Governor or Lieutenant Governor in Council or other chief executive officer or administrator of Ontario or of any other province or territory in Canada,

may be given by the production of,

- (d) a copy of the *Canada Gazette* or of the official gazette for a province or territory purporting to contain a notice of such proclamation, order, regulation or appointment; or
- (e) a copy of such proclamation, order, regulation or appointment purporting to be printed by the Queen's Printer or by the government printer for the province or territory; or
- (f) a copy of or extract from such proclamation, order, regulation or appointment purporting to be certified to be a true copy by such minister or head of a department or by the clerk, or assistant or acting clerk of the Executive Council or by the head of a department of the Government of Canada or of a provincial or territorial government or by his or her deputy or acting deputy. R.S.O. 1980, c. 145, s. 26.

Orders signed by Secretary of State or member of Executive Council

27. An order in writing purporting to be signed by the Secretary of State of Canada and to be written by command of the Governor General shall be received in evidence as the order of the Governor General and an order in writing purporting to be signed by a member of the Executive Council and to be written by command of the Lieutenant Governor shall be received in evidence as the order of the Lieutenant Governor. R.S.O. 1980, c. 145, s. 27.

Notices in *Gazette*

28. Copies of proclamations and of official and other documents, notices and advertisements printed in the *Canada Gazette*, or in *The Ontario Gazette*, or in the official gazette of any province or territory in Canada are proof, in the absence of evidence to the contrary, of the originals and of the contents thereof. R.S.O. 1980, c. 145, s. 28.

## Public or official documents

29. Where the original record could be received in evidence, a copy of an official or public document in Ontario, purporting to be certified under the hand of the proper officer, or the person in whose custody such official or public document is placed, or of a document, by-law, rule, regulation or proceeding, or of an entry in a register or other book of a corporation, created by charter or statute in Ontario, purporting to be certified under the seal of the corporation and the hand of the presiding officer or secretary thereof, is receivable in evidence without proof of the seal of the corporation, or of the signature or of the official character of the person or persons appearing to have signed the same, and without further proof thereof. R.S.O. 1980, c. 145, s. 29.

## Privilege in case of official documents

30. Where a document is in the official possession, custody or power of a member of the Executive Council, or of the head of a ministry of the public service of Ontario, if the deputy head or other officer of the ministry has the document in his or her personal possession, and is called as a witness, he or she is entitled, acting herein by the direction and on behalf of such member of the Executive Council or head of the ministry, to object to producing the document on the ground that it is privileged, and such objection may be taken by him or her in the same manner, and has the same effect, as if such member of the Executive Council or head of the ministry were personally present and made the objection. R.S.O. 1980, c. 145, s. 30.

## Definition

31.--(1) In this section, "municipality" means a regional, metropolitan or district municipality, the County of Oxford, a county, city, town, village, township or improvement district.

## Entries in books

(2) A copy of an entry in a book of account kept by a municipality or in a department of the Government of Canada or of Ontario shall be received as

evidence of such entry and of the matters, transactions and accounts recorded therein, if it is proved by the oath or affidavit of an officer of the municipality or of the department,

- (a) that the book was, at the time of the making of the entry, one of the ordinary books kept by the municipality or in the department;
- (b) that the entry was apparently, and as the deponent believes, made in the usual and ordinary course of business of the municipality or department; and
- (c) that such copy is a true copy thereof. 1989, c. 84, s. 21 (1).

#### Copies of public books or documents

32.--(1) Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, a copy thereof or extract therefrom is admissible in evidence if it is proved that it is an examined copy or extract, or that it purports to be signed and certified as a true copy or extract by the officer to whose custody the original was entrusted.

#### Copies to be delivered if required

(2) Such officer shall furnish the certified copy or extract to any person applying for it at a reasonable time, upon the person paying therefor a sum not exceeding 10 cents for every folio of 100 words. R.S.O. 1980, c. 145, s. 32.

#### Definition

33.--(1) In this section, "bank" means a bank to which the *Bank Act* (Canada) applies or the Province of Ontario Savings Office, and includes a branch, agency or office of any of them.

### Copies of entries in books as proof

(2) Subject to this section, a copy of an entry in a book or record kept in a bank is in any action to which the bank is not a party evidence of such entry and of the matters, transactions and accounts therein recorded.

### Proof required as to entry in ordinary course of business

(3) A copy of an entry in such book or record shall not be received in evidence under this section unless it is first proved that the book or record was at the time of making the entry one of the ordinary books or records of the bank, that the entry was made in the usual and ordinary course of business, that the book or record is in the custody or control of the bank, or its successor, and that such copy is a true copy thereof, and such proof may be given by the manager or accountant, or a former manager of the bank or its successor, and may be given orally or by affidavit.

### Production of books to be required only under order

(4) A bank or officer of a bank is not, in an action to which the bank is not a party, compellable to produce any book or record the contents of which can be proved under this section, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the court or a judge made for special cause.

### Inspection of account

(5) On the application of a party to an action, the court or judge may order that such party be at liberty to inspect and take copies of any entries in the books or records of a bank for the purposes of such proceeding, but a person whose account is to be inspected shall be served with notice of the application at least two clear days before the hearing thereof, and, if it is shown to the satisfaction of the court or judge that such person cannot be notified personally, such notice may be given by addressing it to the bank.



## Costs

(6) The costs of an application to a court or judge under or for the purposes of this section, and the costs of any thing done or to be done under an order of a court or judge made under or for the purposes of this section, are in the discretion of the court or judge who may order such costs or any part thereof to be paid to a party by the bank, where such costs have been occasioned by a default or delay on the part of the bank, and any such order against a bank may be enforced as if the bank were a party to the proceeding. R.S.O. 1980, c. 145, s. 33.

## Definitions

34.--(1) In this section,

"person" includes,

- (a) the Government of Canada and of a province of Canada, and a department, commission, board or branch of any such government,
- (b) a corporation, its successors and assigns, and
- (c) the heirs, executors, administrators or other legal representatives of a person; ("personne")

"photographic film" includes any photographic plate, microphotographic film and photostatic negative, and "photograph" has a corresponding meaning. ("pellicule photographique", "photographier")

## Admissible in evidence

(2) Where a bill of exchange, promissory note, cheque, receipt, instrument, agreement, document, plan or a record or book or entry therein kept or held by a person,

- (a) is photographed in the course of an established practice of such person of photographing objects of the same or a similar class in order to keep a permanent record thereof; and
- (b) is destroyed by or in the presence of such person or of one or more of the person's employees or delivered to another person in the ordinary course of business or lost,

a print from the photographic film is admissible in evidence in all cases and for all purposes for which the object photographed would have been admissible.

Court may refuse to admit in evidence

(3) Where a bill of exchange, promissory note, cheque, receipt, instrument, agreement or other executed or signed document was so destroyed before the expiration of six years from,

- (a) the date when in the ordinary course of business either the object or the matter to which it related ceased to be treated as current by the person having custody or control of the object; or
- (b) the date of receipt by the person having custody or control of the object of notice in writing of a claim in respect of the object or matter prior to the destruction of the object,

whichever is the later date, the court may refuse to admit in evidence under this section a print from a photographic film of the object. R.S.O. 1980, c. 145, s. 34 (1-3).

Exception

(4) Where the photographic print is tendered by a government or the Bank of Canada, or a municipality as defined in subsection 31 (1), subsection (3) does not apply. R.S.O. 1980, c. 145, s. 34 (4); 1989, c. 84, s. 21 (2).

### Proof of compliance with conditions

(5) Proof of compliance with the conditions prescribed by this section may be given by any person having knowledge of the facts either orally or by affidavit sworn or affirmed before a notary public, and, unless the court otherwise orders, a notarial copy of any such affidavit is admissible in evidence in lieu of the original affidavit. R.S.O. 1980, c. 145, s. 34 (5).

### Definitions

**35.--(1)** In this section,

"business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise; ("entreprise")

"record" includes any information that is recorded or stored by means of any device. ("document")

### Where business records admissible

(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

### Notice and production

(3) Subsection (2) does not apply unless the party tendering the writing or record has given at least seven days notice of the party's intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession thereof production for inspection of the writing or record within five days after giving notice to produce the same.

### Surrounding circumstances

(4) The circumstances of the making of such a writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility.

### Previous rules as to admissibility and privileged documents not affected

(5) Nothing in this section affects the admissibility of any evidence that would be admissible apart from this section or makes admissible any writing or record that is privileged. R.S.O. 1980, c. 145, s. 35.

### Judicial notice to be taken of signatures of judges, etc.

**36.--**(1) All courts, judges, justices, masters, clerks of courts, commissioners and other officers acting judicially, shall take judicial notice of the signature of any judge of any court in Canada, in Ontario and in every other province and territory in Canada, where the judge's signature is appended or attached to a decree, order, certificate, affidavit, or judicial or official document.

### Interpretation

(2) The members of the Canadian Transport Commission and of the Ontario Municipal Board, the Mining and Lands Commissioner appointed under the *Ministry of Natural Resources Act* and a referee appointed under the *Drainage Act* shall be deemed judges for the purposes of this section. R.S.O. 1980, c. 145, s. 36.

### Proof of handwriting, when not required

**37.** No proof is required of the handwriting or official position of a person certifying to the truth of a copy of or extract from any proclamation, order, regulation or appointment, or to any matter or thing as to which he or she is by law authorized or required to certify. R.S.O. 1980, c. 145, s. 37.

### Foreign judgments, etc., how proved

38. A judgment, decree or other judicial proceeding recovered, made, had or taken in the Supreme Court of Judicature or in any court of record in England or Ireland or in any of the superior courts of law, equity or bankruptcy in Scotland, or in any court of record in Canada, or in any of the provinces or territories in Canada, or in any British colony or possession, or in any court of record of the United States of America, or of any state of the United States of America, may be proved by an exemplification of the same under the seal of the court without any proof of the authenticity of such seal or other proof whatever, in the same manner as a judgment, decree or other judicial proceeding of the Ontario Court (General Division) may be proved by an exemplification thereof. R.S.O. 1980, c. 145, s. 38, *revised*.

### Copies of notarial acts in Quebec admissible

39.--(1) A copy of a notarial act or instrument in writing made in Quebec before a notary and filed, enrolled or enregistered by such notary, certified by a notary or prothonotary to be a true copy of the original thereby certified to be in his or her possession as such notary or prothonotary, is receivable in evidence in the place and stead of the original, and has the same force and effect as the original would have if produced and proved.

### How impeached

(2) The proof of such certified copy may be rebutted or set aside by proof that there is no such original, or that the copy is not a true copy of the original in some material particular, or that the original is not an instrument of such nature as may, by the law of Quebec, be taken before a notary, or be filed, enrolled or enregistered by a notary. R.S.O. 1980, c. 145, s. 39.

### Protests of bills and notes

40. A protest of a bill of exchange or promissory note purporting to be under the hand of a notary public wherever made is proof, in the absence of evidence to the contrary, of the allegations and facts therein stated. R.S.O. 1980, c. 145, s. 40.



## Effect of certain certificates of notaries

41. Any note, memorandum or certificate purporting to be made by a notary public in Canada, in his or her own handwriting or to be signed by him or her at the foot of or embodied in any protest, or in a regular register of official acts purporting to be kept by him or her is proof, in the absence of evidence to the contrary, of the fact of notice of non-acceptance or non-payment of a bill of exchange or promissory note having been sent or delivered at the time and in the manner stated in such note, certificate or memorandum. R.S.O. 1980, c. 145, s. 41.

## Proving titles under Small Claims Court executions

42. In proving a title under a sheriff's conveyance based upon an execution issued from the Small Claims Court, it is sufficient to prove the judgment recovered in the Small Claims Court without proof of any prior proceedings. R.S.O. 1980, c. 145, s. 42, *revised*.

## Solemn declaration

43. Any person authorized to take declarations in Ontario may receive the solemn declaration of any person in attestation of the truth of any fact or of any account rendered in writing and the declaration and any declaration authorized or required by any Act of the Legislature shall be in the following form:

I, ....., solemnly declare that (*state*  
the fact or facts declared to), and I make this solemn declaration  
conscientiously believing it to be true and knowing that it is of the same  
force and effect as if made under oath.

Declared before me

at the        of

this

day of

, 19

A Commissioner, etc.

R.S.O. 1980, c. 145, s. 43.

## Oaths, etc., administered by commissioned officers

44.--(1) An oath, affidavit, affirmation or statutory declaration administered, sworn, affirmed or made in or outside Ontario before a person who holds a commission as an officer in the Canadian Forces and is on full-time service is as valid and effectual to all intents and purposes as if it had been duly administered, sworn, affirmed or made in Ontario before a commissioner for taking affidavits in Ontario.

## Admissibility

(2) A document that purports to be signed by a person mentioned in subsection (1) in testimony of an oath, affidavit, affirmation or statutory declaration having been administered, sworn, affirmed or made before him or her and on which the officer's rank and unit are shown below his or her signature is admissible in evidence without proof of the signature or rank or unit or that he or she is on full-time service. R.S.O. 1980, c. 145, s. 44.

## Oaths, etc., administered outside Ontario

45.--(1) An oath, affidavit, affirmation or statutory declaration administered, sworn, affirmed or made outside Ontario before,

- (a) a judge;
- (b) a magistrate;
- (c) an officer of a court of justice;
- (d) a commissioner for taking affidavits or other competent authority of the like nature;
- (e) a notary public;
- (f) the head of a city, town, village, township or other municipality;

- (g) an officer of any of Her Majesty's diplomatic or consular services, including an ambassador, envoy, minister, charge d'affairs, counsellor, secretary, attache, consul-general, consul, vice-consul, pro-consul, consular agent, acting consul-general, acting consul, acting vice-consul and acting consular agent;
- (h) an officer of the Canadian diplomatic, consular or representative services, including, in addition to the diplomatic and consular officers mentioned in clause (g), a high commissioner, permanent delegate, acting high commissioner, acting permanent delegate, counsellor and secretary; or
- (i) a Canadian Government trade commissioner or assistant trade commissioner,

exercising his or her functions or having jurisdiction or authority as such in the place in which it is administered, sworn, affirmed or made, is as valid and effectual to all intents and purposes as if it had been duly administered, sworn, affirmed or made in Ontario before a commissioner for taking affidavits in Ontario.

#### Idem

(2) An oath, affidavit, affirmation or statutory declaration administered, sworn, affirmed or made outside Ontario before a notary public for Ontario or before a commissioner for taking affidavits in Ontario is as valid and effectual to all intents and purposes as if it had been duly administered, sworn, affirmed or made in Ontario before a commissioner for taking affidavits in Ontario.

#### Admissibility

(3) A document that purports to be signed by a person mentioned in subsection (1) or (2) in testimony of an oath, affidavit, affirmation or statutory declaration having been administered, sworn, affirmed or made before him or

her, and on which the person's office is shown below his or her signature, and

- (a) in the case of a notary public, that purports to have impressed thereon or attached thereto his or her official seal;
- (b) in the case of a person mentioned in clause (1) (f), that purports to have impressed thereon or attached thereto the seal of the municipality;
- (c) in the case of a person mentioned in clause (1) (g), (h) or (i), that purports to have impressed thereon or attached thereto his or her seal or the seal or stamp of his or her office or of the office to which he or she is attached,

is admissible in evidence without proof of his or her signature or of his or her office or official character or of the seal or stamp and without proof that he or she was exercising his or her functions or had jurisdiction or authority in the place in which the oath, affidavit, affirmation or statutory declaration was administered, sworn, affirmed or made. R.S.O. 1980, c. 145, s. 45.

#### Formal defects, when not to vitiate

**46.** No informality in the heading or other formal requisites to any affidavit, declaration or affirmation made or taken before a commissioner or other person authorized to take affidavits under the *Commissioners for taking Affidavits Act*, or under this Act, is any objection to its reception in evidence if the court or judge before whom it is tendered thinks proper to receive it. R.S.O. 1980, c. 145, s. 46.

#### Affidavit sworn by solicitor for a party

**47.** An affidavit or declaration is not inadmissible or unusable in evidence in an action for the reason only that it is made before the solicitor of a party to the action or before the partner, associate, clerk or agent of such solicitor. R.S.O. 1980, c. 145, s. 47.

## Admissibility of copies of depositions

**48.--**(1) Where an examination or deposition of a party or witness has been taken before a judge or other officer or person appointed to take it, copies of it, certified under the hand of the judge, officer or other person taking it, shall, without proof of the signature, be received and read in evidence, saving all just exceptions. R.S.O. 1980, c. 145, s. 48.

## Presumption

(2) An examination or deposition received or read in evidence under subsection (1) shall be presumed to represent accurately the evidence of the party or witness, unless there is good reason to doubt its accuracy. 1984, c. 11, s. 176 (1).

## Effect of probate, etc., as evidence of will, etc.

**49.** In order to establish a devise or other testamentary disposition of or affecting real estate, probate of the will or letters of administration with the will annexed containing such devise or disposition, or a copy thereof, under the seal of the court that granted it or under the seal of the Ontario Court (General Division), are proof, in the absence of evidence to the contrary, of the will and of its validity and contents. R.S.O. 1980, c. 145, s. 49; 1989, c. 56, s. 13.

## Proof in the case of will of real estate filed in courts outside Ontario

**50.--**(1) Where a person dies in any of Her Majesty's possessions outside Ontario having made a will sufficient to pass real estate in Ontario, purporting to devise, charge or affect real estate in Ontario, the party desiring to establish any such disposition, after giving one month's notice to the opposite party to the proceeding of the party's intentions so to do, may produce and file the probate of the will or letters of administration with the will annexed or a certified copy thereof under the seal of the court that granted the same with a certificate of the judge, registrar or clerk of such court that the original will is filed and remains in the court and purports to have been executed before two witnesses, and such probate or letters of administration or certified copy with



such certificate is, unless the court otherwise orders, evidence of the will and of its validity and contents.

#### Effect of certificate

(2) The production of the certificate mentioned in subsection (1) is sufficient evidence of the facts therein stated and of the authority of the judge, registrar or clerk, without proof of his or her appointment, authority or signature.

R.S.O. 1980, c. 145, s. 50.

#### Military records

51. The production of a certificate, purporting to be signed by an authority authorized in that behalf by the *National Defence Act* (Canada) or by regulations made thereunder, stating that the person named in the certificate died, or was deemed to have died, on a date set forth therein, is proof, in the absence of evidence to the contrary, for any purpose to which the authority of the Legislature extends that the person so named died on that date, and also of the office, authority and signature of the person signing the certificate, without any proof of his or her appointment, authority or signature. R.S.O. 1980, c. 145, s. 51.

#### Definition

52.--(1) In this section,

"practitioner" means,

- (a) a person licensed to practise under the *Health Disciplines Act*,
- (b) a drugless practitioner registered under the *Drugless Practitioners Act*,
- (c) a denture therapist under the *Denture Therapists Act*,
- (d) a chiropodist registered under the *Chiropody Act*,

- (e) a registered psychologist under the *Psychologists Registration Act*, or
- (f) a person licensed or registered to practise in another part of Canada under an Act that is similar to an Act referred to in clause (a), (b), (c), (d) or (e).

#### Medical reports

(2) A report obtained by or prepared for a party to an action and signed by a practitioner and any other report of the practitioner that relates to the action are, with leave of the court and after at least ten days notice has been given to all other parties, admissible in evidence in the action.

#### Entitlement

(3) Unless otherwise ordered by the court, a party to an action is entitled, at the time that notice is given under subsection (2), to a copy of the report together with any other report of the practitioner that relates to the action.

#### Report required

(4) Except by leave of the judge presiding at the trial, a practitioner who signs a report with respect to a party shall not give evidence at the trial unless the report is given to all other parties in accordance with subsection (2).

#### If practitioner called unnecessarily

(5) If a practitioner is required to give evidence in person in an action and the court is of the opinion that the evidence could have been produced as effectively by way of a report, the court may order the party that required the attendance of the practitioner to pay as costs therefor such sum as the court considers appropriate. 1989, c. 68, s. 1.

## Definition

53.--(1) In this section, "instrument" has the meaning assigned to it in section 1 of the *Registry Act*.

## Registered instrument as evidence

(2) A copy of an instrument or memorial, certified under the hand and seal of office of the land registrar in whose office it is deposited, filed, kept or registered, to be a true copy, is evidence of the original, except in the cases provided for in subsection (3).

## Where certified copies of registered instruments may be used

(3) Where it would be necessary to produce and prove an instrument or memorial that has been so deposited, filed, kept or registered in order to establish such instrument or memorial and the contents thereof, the party intending to prove it may give notice to the opposite party, at least ten days before the trial or other proceeding in which the proof is intended to be adduced, that the party intends at the trial or other proceeding to give in evidence, as proof of the instrument or memorial, a copy thereof certified by the land registrar, under his or her hand and seal of office, and in every such case the copy so certified is sufficient evidence of the instrument or memorial and of its validity and contents unless the party receiving the notice, within four days after such receipt, gives notice that the party disputes its validity, in which case the costs of producing and proving it may be ordered to be paid by any or either of the parties as is considered just. R.S.O. 1980, c. 145, s. 53.

## Filing copies of official documents

54.--(1) Where a public officer produces upon a summons an original document, it shall not be deposited in court unless otherwise ordered, but, if the document or a copy is needed for subsequent reference or use, a copy thereof or of so much thereof as is considered necessary, certified under the hand of the officer producing the document or otherwise proved, shall be filed as an exhibit in the place of the original, and the officer is entitled to receive

in addition to his or her ordinary fees the fees for any certified copy, to be paid to the officer before it is delivered or filed.

#### When original to be retained

(2) Where an order is made that the original be retained, the order shall be delivered to the public officer and the exhibit shall be retained in court and filed. R.S.O. 1980, c. 145, s. 54.

#### Proof of certain written instruments

**55.--**(1) A party intending to prove the original of a telegram, letter, shipping bill, bill of lading, delivery order, receipt, account or other written instrument used in business or other transactions, may give notice to the opposite party, ten days at least before the trial or other proceeding in which the proof is intended to be adduced, that the party intends to give in evidence as proof of the contents a writing purporting to be a copy of the documents, and in the notice shall name some convenient time and place for the inspection thereof.

#### Inspection

(2) Such copy may then be inspected by the opposite party, and is without further proof sufficient evidence of the contents of the original document, and shall be accepted and taken in lieu of the original, unless the party receiving the notice within four days after the time mentioned for such inspection gives notice that the party intends to dispute the correctness or genuineness of the copy at the trial or proceeding, and to require proof of the original, and the costs attending any production or proof of the original document are in the discretion of the court. R.S.O. 1980, c. 145, s. 55.

#### Where no attestation required

**56.** It is not necessary to prove, by the attesting witness, an instrument to the validity of which attestation is not requisite. R.S.O. 1980, c. 145, s. 56.

### Comparison of disputed writing with genuine

**57.** Comparison of a disputed writing with a writing proved to the satisfaction of the court to be genuine shall be permitted to be made by a witness, and such writings and the evidence of witnesses respecting them may be submitted to the court or jury as evidence of the genuineness or otherwise of the writing in dispute. R.S.O. 1980, c. 145, s. 57.

### Where instruments offered in evidence may be impounded

**58.** Where a document is received in evidence, the court admitting it may direct that it be impounded and kept in such custody for such period and subject to such conditions as seem proper, or until the further order of the court or of the Ontario Court (General Division) or of a judge thereof, as the case may be. R.S.O. 1980, c. 145, s. 58, *revised*.

### Evidence dispensed with under *Vendors and Purchasers Act*

**59.** It is not necessary in an action to produce any evidence that, by section 1 of the *Vendors and Purchasers Act*, is dispensed with as between vendor and purchaser, and the evidence declared to be sufficient as between vendor and purchaser is sufficient for the purposes of the action. R.S.O. 1980, c. 145, s. 59.

### Evidence for foreign tribunals

**60.--(1)** Where it is made to appear to the Ontario Court (General Division) or a judge thereof, that a court or tribunal of competent jurisdiction in a foreign country has duly authorized, by commission, order or other process, for a purpose for which a letter of request could be issued under the rules of court, the obtaining of the testimony in or in relation to an action, suit or proceeding pending in or before such foreign court or tribunal, of a witness out of the jurisdiction thereof and within the jurisdiction of the court or judge so applied to, such court or judge may order the examination of such witness before the person appointed, and in the manner and form directed by the commission, order or other process, and may, by the same or by a subsequent order, command the attendance of a person named therein for



the purpose of being examined, or the production of a writing or other document or thing mentioned in the order, and may give all such directions as to the time and place of the examination, and all other matters connected therewith as seem proper, and the order may be enforced, and any disobedience thereto punished, in like manner as in the case of an order made by the court or judge in an action pending in the court or before a judge of the court. R.S.O. 1980, c. 145, s. 60 (1); 1984, c. 11, s. 176 (2), *revised*.

#### Payment of expenses of witness

(2) A person whose attendance is so ordered is entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in the Ontario Court (General Division). R.S.O. 1980, c. 145, s. 60 (2), *revised*.

#### Right of refusal to answer questions and to produce documents

(3) A person examined under such commission, order or process has the like right to object to answer questions tending to criminate himself or herself, and to refuse to answer any questions that, in an action pending in the court by which or by a judge whereof or before the judge by whom the order for examination was made, the witness would be entitled to object or to refuse to answer, and no person shall be compelled to produce at the examination any writing, document or thing that the person could not be compelled to produce at the trial of such an action.

#### Administration of oath

(4) Where the commission, order or other process, or the instructions of the court accompanying the same, direct that the person to be examined shall be sworn or shall affirm, the person so appointed has authority to administer the oath to the person or take his or her affirmation. R.S.O. 1980, c. 145, s. 60 (3, 4).



## Interpretation Act

### Application of Act

1.--(1) The provisions of this Act apply to every Act of the Legislature contained in these Revised Statutes or here-after passed, except in so far as any such provision,

- (a) is inconsistent with the intent or object of the Act;
- (b) would give to a word, expression or provision of the Act an interpretation inconsistent with the context; or
- (c) is in the Act declared not applicable thereto.

### Application of certain sections to regulations

(2) Sections 2, 4, 9, 28 and 29 apply to the regulations made under the authority of an Act. R.S.O. 1980, c. 219, s. 1.

### Interpretation provisions in other Acts

2. Where an Act contains an interpretation provision, it shall be read and construed as subject to the exceptions contained in subsection 1 (1). R.S.O. 1980, c. 219, s. 2.

### Application to this Act

3. The provisions of this Act apply to the construction of it and to the words and expressions used in it. R.S.O. 1980, c. 219, s. 3.

## RULES OF CONSTRUCTION

## Law always speaking

4. The law shall be considered as always speaking and, where a matter or thing is expressed in the present tense, it is to be applied to the circumstances as they arise, so that effect may be given to each Act and every part of it according to its true intent and meaning. R.S.O. 1980, c. 219, s. 4.

## What may be done under an Act before it is in operation

5. Where an Act is not to come into operation immediately on the passing thereof and confers power to make an appointment, to make, grant or issue an order, warrant, scheme, letters patent, rules, regulations or by-laws, to give notices, to prescribe forms, or to do any thing for the purposes of the Act, that power may be exercised at any time after the passing of the Act, but an instrument made under the power, unless the contrary is necessary for bringing the Act into operation, does not come into operation until the Act comes into operation. R.S.O. 1980, c. 219, s. 5.

## Meaning of expressions used in instruments issued under an Act

6. Where an Act confers power to make, grant or issue an order, warrant, scheme, letters patent, rule, regulation or by-law, expressions used therein, unless the contrary intention appears, have the same meaning as in the Act conferring the power. R.S.O. 1980, c. 219, s. 6.

## Judicial notice

7.--(1) Every Act shall be judicially noticed by judges, justices of the peace and others without being specially pleaded.

## Idem

(2) Every proclamation shall be judicially noticed by judges, justices of the peace and others without being specially pleaded. R.S.O. 1980, c. 219, s. 7.

### Effect of preamble

8. The preamble of an Act shall be deemed a part thereof and is intended to assist in explaining the purport and object of the Act. R.S.O. 1980, c. 219, s. 8.

### Marginal notes, headings, etc., not part of Act

9. The marginal notes and headings in the body of an Act and references to former enactments form no part of the Act but shall be deemed to be inserted for convenience of reference only. R.S.O. 1980, c. 219, s. 9.

### All Acts remedial

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit. R.S.O. 1980, c. 219, s. 10.

### The Crown

11. No Act affects the rights of Her Majesty, Her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby. R.S.O. 1980, c. 219, s. 11.

### Private Acts

12. No Act of the nature of a private Act affects the rights of any person, or body corporate, politic or collegiate, such only excepted as are therein mentioned or referred to. R.S.O. 1980, c. 219, s. 12.



## REPEAL, AMENDMENT AND CONSOLIDATION

## Reservation of power to repeal or amend

13. Every Act shall be construed as reserving to the Legislature the power of repealing or amending it, and of revoking, restricting, or modifying any power, privilege or advantage thereby vested in or granted to any person or party, whenever the repeal, amendment, revocation, restriction or modification is considered by the Legislature to be required for the public good. R.S.O. 1980, c. 219, s. 13.

## Repeal, effect

14.--(1) Where an Act is repealed or where a regulation is revoked, the repeal or revocation does not, except as in this Act otherwise provided,

- (a) revive any Act, regulation or thing not in force or existing at the time at which the repeal or revocation takes effect;
- (b) affect the previous operation of any Act, regulation or thing so repealed or revoked;
- (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, regulation or thing so repealed or revoked;
- (d) affect any offence committed against any Act, regulation or thing so repealed or revoked, or any penalty or forfeiture or punishment incurred in respect thereof;
- (e) affect any investigation, legal proceeding or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture or punishment,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the Act, regulation or thing had not been so repealed or revoked.

## When other provisions substituted

(2) If other provisions are substituted for those so repealed or revoked,

- (a) all officers and persons acting under the Act, regulation or thing so repealed or revoked, shall continue to act as if appointed under the provisions so substituted until others are appointed in their stead;
- (b) all proceedings taken under the Act, regulation or thing so repealed or revoked, shall be taken up and continued under and in conformity with the provisions so substituted, so far as consistently may be;
- (c) in the recovery or enforcement of penalties and forfeitures incurred, and in the enforcement of rights existing or accruing under the Act, regulation or thing so repealed or revoked, or in any other proceeding in relation to matters that have happened before the repeal or revocation, the procedure established by the substituted provisions shall be followed so far as it can be adapted; and
- (d) if any penalty, forfeiture or punishment is reduced or mitigated by any of the provisions of the Act, regulation or thing whereby such other provisions are substituted, the penalty, forfeiture or punishment, if imposed or adjudged after such repeal or revocation, shall be reduced or mitigated accordingly. R.S.O. 1980, c. 219, s. 14.

## Re-enactment, amendment, consolidation and revision

**15.** Where an Act is repealed and other provisions are substituted by way of re-enactment, amendment, revision or consolidation,

- (a) all regulations, orders, rules and by-laws made under the repealed Act continue good and valid in so far as they are not

inconsistent with the substituted Act until they are annulled and others made in their stead; and

- (b) a reference in an unrepealed Act, or in a rule, order or regulation made thereunder to such repealed Act, shall, as regards any subsequent transaction, matter or thing be held and construed to be a reference to the provisions of the substituted Act relating to the same subject-matter and, if there is no provision in the substituted Act relating to the same subject-matter, the repealed Act stands good and shall be read and construed as unrepealed in so far, and in so far only, as is necessary to support, maintain or give effect to such unrepealed Act, or such rule, order or regulation made thereunder. R.S.O. 1980, c. 219, s. 15.

Repeal of Act not a declaration that Act was in force

16. The repeal of an Act shall be deemed not to be or to involve a declaration that the Act was or was considered by the Legislature to have been previously in force. R.S.O. 1980, c. 219, s. 16.

Repeal or amendment not a declaration of previous law

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law. R.S.O. 1980, c. 219, s. 17.

Amendment of Act not a declaration of different state of law

18. The amendment of an Act shall be deemed not to be or to involve a declaration that the law under the Act was or was considered by the Legislature to have been different from the law as it has become under the Act as so amended. R.S.O. 1980, c. 219, s. 18.

Re-enactment, etc., not an adoption of judicial construction

**19.** The Legislature shall not, by re-enacting, revising, consolidating or amending an Act, be deemed to have adopted the construction that has by judicial decision or otherwise been placed upon the language used in the Act or upon similar language. R.S.O. 1980, c. 219, s. 19.

## DEATH OF SOVEREIGN

Death of Sovereign

**20.** Where a reigning Sovereign dies, no rule or construction of law shall be applied so as to prevent the continuation of any matter under the successor to the Crown as if the death had not occurred. 1984, c. 11, s. 184 (1).

## PROCLAMATIONS

Lieutenant Governor acting by proclamation

**21.** Where the Lieutenant Governor is authorized to do any act by proclamation, the proclamation is to be understood to be a proclamation issued under an order of the Lieutenant Governor in Council, but it is not necessary for the proclamation to mention that it is issued under such an order. R.S.O. 1980, c. 219, s. 20.

## CROWN APPOINTMENTS

Tenure of office

**22.** Authority to the Lieutenant Governor to make an appointment to an office, by commission or otherwise, shall be deemed authority to appoint during pleasure. R.S.O. 1980, c. 219, s. 21.

## REGULATIONS

## Regulations

23. The Lieutenant Governor in Council may make regulations for the due enforcement and carrying into effect of any Act of the Legislature and, where there is no provision in the Act, may prescribe forms and may fix fees to be charged by all officers and persons by whom anything is required to be done. R.S.O. 1980, c. 219, s. 22.

## IMPRISONMENT

## Imprisonment, place

24. If in an Act a person is directed to be imprisoned or committed to prison, the imprisonment or committal shall, if no other place is mentioned or provided by law, be in or to the correctional institution of the locality in which the order for the imprisonment is made or, if there be no correctional institution there, then in or to the correctional institution that is nearest to such locality. R.S.O. 1980, c. 219, s. 23.

## Hard labour

25. Where power to impose imprisonment is conferred by an Act, it shall be deemed to authorize the imposing of imprisonment with hard labour. R.S.O. 1980, c. 219, s. 24.

## OFFENCE UNDER MORE THAN ONE PROVISION

## Offence under more than one provision

26. Where an act or omission constitutes an offence under two or more Acts, the offender, unless the contrary intention appears, is liable to be prosecuted and punished under either or any of those Acts, but is not liable to be punished twice for the same act or omission. R.S.O. 1980, c. 219, s. 25.



## CORPORATIONS

## Effect of words constituting a corporation

**27.** In every Act, unless the contrary intention appears, words making any association or number of persons a corporation or body politic and corporate,

- (a) vest in the corporation power to sue and be sued, to contract and be contracted with by its corporate name, to have a common seal, to alter or change the seal at its pleasure, to have perpetual succession, to acquire and hold personal property or movables for the purpose for which the corporation is constituted, and to alienate the same at pleasure;
- (b) vest in a majority of the members of the corporation the power to bind the others by their acts; and
- (c) exempt individual members of the corporation from personal liability for its debts, obligations or acts if they do not contravene the provisions of the Act incorporating them.  
R.S.O. 1980, c. 219, s. 26.

## IMPLIED PROVISIONS

## Implied provisions,

**28.** In every Act, unless the contrary intention appears,

## as to jurisdiction

- (a) where anything is directed to be done by or before a provincial judge or a justice of the peace or other public functionary or officer, it shall be done by or before one whose jurisdiction or powers extend to the place where it is to be done;

## implied powers

- (b) where power is given to a person, officer or functionary to do or to enforce the doing of an act or thing, all such powers shall be understood to be also given as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing;

## acts to be done by more than two

- (c) where an act or thing is required to be done by more than two persons, a majority of them may do it;

## deviation from forms

- (d) where a form is prescribed, deviations therefrom not affecting the substance or calculated to mislead do not vitiate it;

## powers and duties to be exercised and performed from time to time

- (e) where a power is conferred or a duty is imposed on the holder of an office as such, the power may be exercised and the duty shall be performed from time to time as occasion requires;

## to be exercised and performed by holder of office for time being

- (f) where a power is conferred or a duty is imposed on the holder of an office as such, the power may be exercised and the duty shall be performed by the holder of the office for the time being;

## power to make by-laws, etc., to confer power to alter

- (g) where power is conferred to make by-laws, regulations, rules or orders, it includes power to alter or revoke the same from time to time and make others;

computation of time where time limited expires on a holiday

- (h) where the time limited by an Act for a proceeding or for the doing of anything under its provisions expires or falls upon a holiday, the time so limited extends to and the thing may be done on the day next following that is not a holiday;

idem

- (i) where the time limited for a proceeding or for the doing of any thing in a court office, a land registry office or a sheriff's office expires or falls on a day that is prescribed as a holiday for that office, the time so limited extends to and the thing may be done on the day next following that is not a holiday;

number and gender

- (j) words importing the singular number or the masculine gender only include more persons, parties or things of the same kind than one, and females as well as males and the converse;

idem

- (k) a word interpreted in the singular number has a corresponding meaning when used in the plural;

words authorizing appointment include power to remove

- (l) words authorizing the appointment of a public officer or functionary, or a deputy, include the power of removing a reappointing the person or appointing another in or to act in his or her stead, from time to time in the discretion of the authority in whom the power of appointment is vested;

directions to public officer to apply to successors and deputy

- (m) words directing or empowering a public officer or functionary to do an act or thing, or otherwise applying to the public officer by his or her name of office, include his or her successors in office and lawful deputy;

reference to sections by numbers

- (n) where reference is made by number or letter to two or more sections, subsections, paragraphs, clauses or other provisions in an Act, the number or letter first mentioned and the one last mentioned shall both be deemed to be included in the reference;

words authorizing appointment include power to appoint deputy

- (o) words authorizing the appointment of a public officer or functionary or the appointment of a person to administer an Act include the power of appointing a deputy to perform and have all the powers and authority of such public officer or functionary or person to be exercised in such manner and upon such occasions as are specified in the instrument appointing him or her, or such limited powers and authority as the instrument prescribes. R.S.O. 1980, c. 219, s. 27; 1989, c. 56, s. 20 (1).

## WORDS AND TERMS

Words and terms

29.--(1) In every Act, unless the context otherwise requires,

"Act" includes enactment; ("loi")

"affidavit", in the case of persons allowed by law to affirm or declare instead of swearing, includes affirmation and declaration; ("affidavit")

"Assembly" means the Legislative Assembly of Ontario; ("Assemblée")

"county" includes two or more counties united for purposes to which the Act relates; ("comté")

"Court of Appeal" means the Court of Appeal for Ontario; ("Cour d'appel")

"Divisional Court" means the Divisional Court of the Ontario Court (General Division); ("Cour divisionnaire")

"Great Seal" means the Great Seal of Ontario; ("grand sceau")

"herein" used in a provision of an Act relates to the whole Act and not to that provision only; ("ci-inclus", "dans les présentes")

"Her Majesty", "His Majesty", "the Queen", "the King" or "the Crown" means the Sovereign of the United Kingdom, Canada and Her other Realms and Territories, and Head of the Commonwealth; ("Sa Majesté", "la Reine", "le Roi", "la Couronne")

"holiday" includes Sunday, New Year's Day, Good Friday, Easter Monday, Christmas Day, the birthday or the day fixed by proclamation of the Governor General for the celebration of the birthday of the reigning Sovereign, Victoria Day, Dominion Day, Labour Day, Remembrance Day, and any day appointed by proclamation of the Governor General or the Lieutenant Governor as a public holiday or for a general fast or thanksgiving, and when any holiday, except Remembrance Day, falls on a Sunday, the day next following is in lieu thereof a holiday; ("jour férié")

"justice of the peace" includes two or more justices of the peace or provincial judges assembled or acting together; ("juge de paix")

"legally qualified medical practitioner", "duly qualified medical practitioner", or any words importing legal recognition of a person as a medical practitioner or member of the medical profession, means a person licensed under Part III of the *Health Disciplines Act*; ("médecin dûment qualifié", "médecin dûment qualifié pour exercer sa profession")



"Lieutenant Governor" means the Lieutenant Governor of Ontario, or the chief executive officer or administrator for the time being carrying on the government of Ontario by whatever title that person is designated; ("lieutenant-gouverneur")

"Lieutenant Governor in Council" means the Lieutenant Governor of Ontario or the person administering the government of Ontario for the time being acting by and with the advice of the Executive Council of Ontario; ("lieutenant-gouverneur en conseil")

"mental defective" and "mentally defective person" means a person in whom there is a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, and who requires care, supervision and control for his or her own protection or welfare or for the protection of others; ("déficient mental", "personne ayant une déficience mentale")

"mental deficiency" means the condition of mind of a mental defective; ("déficiency mentale")

"mental illness" means the condition of mind of a mentally ill person; ("maladie mentale")

"mental incompetency" means the condition of mind of a mentally incompetent person; ("incapacité mentale")

"mental incompetent" and "mentally incompetent person" means a person,

- (i) in whom there is such a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, or
- (ii) who is suffering from such a disorder of the mind,

that the person requires care, supervision and control for his or her protection and the protection of his or her property; ("incapable mental", "personne frappée d'incapacité mentale")

"mentally ill person" means a person, other than a mental defective, who is suffering from such a disorder of the mind that he or she requires care, supervision and control for his or her own protection or welfare, or for the protection of others; ("malade mental")

"month" means a calendar month; ("mois")

"newspaper", in a provision requiring publication in a newspaper, means a printed publication in sheet form, intended for general circulation, published regularly at intervals of not longer than a week, consisting in great part of news of current events of general interest and sold to the public and to regular subscribers; ("journal")

"now", "next", "heretofore" and "hereafter" shall be construed as having reference to the date of the coming into force of the Act; ("maintenant", "prochainement", "jusqu'ici", "dorénavant")

"oath", in the case of persons allowed by law to affirm or declare instead of swearing, includes affirmation and declaration; ("serment")

"peace officer" includes a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer, and justice of the peace, and also the superintendent, governor, jailer, keeper, guard or any other officer or permanent employee of a correctional institution, and also a police officer, bailiff, constable or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process; ("agent de la paix")

"person" includes a corporation and the heirs, executors, administrators or other legal representatives of a person to whom the context can apply according to law; ("personne")

"proclamation" means a proclamation under the Great Seal; ("proclamation")

"registrar" includes a deputy registrar; ("greffier", "registrator", "registraire", "préposé aux registres")

"rules committee" means a rules committee established under the *Courts of Justice Act*; ("comité des règles")

"rules of court", when used in relation to a court, means rules made by the authority having power to make rules or orders regulating the practice and procedure of such court, or for the purpose of an Act directing or authorizing anything to be done by rules of court; ("règles de pratique")

"security" means sufficient security, and "sureties" means sufficient sureties, and where these words are used, one person is sufficient therefor unless otherwise expressly required; ("caution", "cautionnement")

"swear", in the case of persons for the time being allowed by law to affirm or declare instead of swearing, includes affirm and declare, and "sworn" has a corresponding meaning; ("prêter serment", "sous serment", "assermenté")

"writing", "written", or any term of like import, includes words printed, painted, engraved, lithographed, photographed, or represented or reproduced by any other mode in a visible form; ("écrit")

"year" means a calendar year. ("an", "année") R.S.O. 1980, c. 219, s. 30; 1984, c. 11, s. 184 (3); 1989, c. 56, s. 20 (2), *part, revised*.

#### Imperative and permissive forms

(2) In the English version of an Act, the word "shall" shall be construed as imperative and the word "may" as permissive. In the French version, obligation is usually expressed by the use of the present indicative form of the relevant verb, and occasionally by other verbs or expressions that convey that meaning; the conferring of a power, right, authorization or permission is usually expressed by the use of the verb "pouvoir", and occasionally by other expressions that convey those meanings. R.S.O. 1980, c. 219, s. 30, *part, revised*.

## SPECIAL INTERPRETATION CLAUSES

## Legal Matters

30. The interpretation section of the *Courts of Justice Act* extends to all Acts relating to legal matters. R.S.O. 1980, c. 219, s. 31; 1984, c. 11, s. 184 (4).

## Municipal matters

31. The interpretation section of the *Municipal Act* extends to all Acts relating to municipal matters. R.S.O. 1980, c. 219, s. 32.

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**Provincial Offences Act****CONTENTS**

Definitions .....	S4-1
Purpose of Act .....	S4-2
Part I	
Commencement of Proceedings by Certificate of Offence .....	S4-3
Part II	
Commencement of Proceedings for Parking Infractions .....	S4-11
Part III	
Commencement of Proceeding by Information .....	S4-29
Part IV	
Trial and Sentencing .....	S4-36
Part V	
General Provisions .....	S4-71
Part VI	
Young Persons .....	S4-78
Part VII	
Appeals and Review .....	S4-87
Part VIII	
Arrest, Bail and Search Warrants.....	S4-105
Part IX	
Orders on Application under Statutes.....	S4-119



**Provincial Offences Act****INTERPRETATION**

## Definitions

1.--(1) In this Act,

"certificate" means a certificate of offence issued under Part I or a certificate of parking infraction issued under Part II; ("procès-verbal")

"court" means the Ontario Court (Provincial Division); ("tribunal")

"judge" means a provincial judge; ("juge provincial")

"justice" means a provincial judge or a justice of the peace; ("juge")

"offence" means an offence under an Act of the Legislature or under a regulation or by-law made under the authority of an Act of the Legislature; ("infraction")

"police officer" means a chief of police or other police officer but does not include a special constable or by-law enforcement officer; ("agent de police")

"prescribed" means prescribed by the rules of court; ("prescrit")

"prosecutor" means the Attorney General or, where the Attorney General does not intervene, means the person who issues a certificate or lays an information and includes counsel or agent acting on behalf of either of them; ("poursuivant")

"provincial offences officer" means a police officer or a person designated under subsection (3); ("agent des infractions provinciales")

"set fine" means the amount of fine set by the Chief Judge of the Ontario Court (Provincial Division) for an offence for the purpose of proceedings commenced under Part I or II. ("amende fixée")

#### Idem

(2) In this Act, "municipality" includes a regional, district or metropolitan municipality.

#### Designation of provincial offences officers

(3) A minister of the Crown may designate in writing any person or class of persons as a provincial offences officer for the purposes of all or any class of offences. R.S.O. 1990, c. P.33, s. 1.

#### Purpose of Act

2.--(1) The purpose of this Act is to replace the summary conviction procedure for the prosecution of provincial offences, including the provisions adopted by reference to the *Criminal Code* (Canada), with a procedure that reflects the distinction between provincial offences and criminal offences.

#### Interpretation

(2) Where, as an aid to the interpretation of provisions of this Act, recourse is had to the judicial interpretation of and practices under corresponding provisions of the *Criminal Code* (Canada), any variation in wording without change in substance shall not, in itself, be construed to intend a change of meaning. R.S.O. 1990, c. P.33, s. 2.

**PART I**  
**COMMENCEMENT OF PROCEEDINGS**  
**BY CERTIFICATE OF OFFENCE**

Certificate of offence

3.--(1) In addition to the procedure set out in Part III for commencing a proceeding by laying an information, a proceeding in respect of an offence may be commenced by filing a certificate of offence alleging the offence in the office of the court.

Issuance and service

(2) A provincial offences officer who believes that one or more persons have committed an offence may issue, by completing and signing, a certificate of offence certifying that an offence has been committed and,

- (a) an offence notice indicating the set fine for the offence; or
- (b) a summons,

in the form prescribed under section 13.

Service

(3) The offence notice or summons shall be served personally upon the person charged within thirty days after the alleged offence occurred.

Signature

(4) Upon the service of an offence notice or summons, the person charged shall be requested to sign the certificate of offence, but the failure or refusal to sign as requested does not invalidate the certificate of offence or the service of the offence notice or summons.



### Certificate of service

(5) Where service is made by the provincial offences officer who issued the certificate of offence, the officer shall certify on the certificate of offence that he or she personally served the offence notice or summons on the person charged and the date of service.

### Affidavit of service

(6) Where service is made by a person other than the provincial offences officer who issued the certificate of offence, he or she shall complete an affidavit of service in the prescribed form.

### Certificate as evidence

(7) A certificate of service of an offence notice or summons purporting to be signed by the provincial offences officer issuing it or an affidavit of service under subsection (6) shall be received in evidence and is proof of personal service in the absence of evidence to the contrary.

### Officer not to act as agent

(8) The provincial offences officer who serves an offence notice or summons under this section shall not receive payment of any money in respect of a fine, or receive the offence notice for delivery to the court. R.S.O. 1990, c. P.33, s. 3.

### Filing of certificate of offence

4. A certificate of offence shall be filed in the office of the court as soon as is practicable after service of the offence notice or summons. R.S.O. 1990, c. P.33, s. 4.

## Dispute with trial

5.--(1) Where an offence notice is served on a defendant, the defendant may plead not guilty by signing the not guilty plea on the offence notice and indicate the defendant's desire in the form prescribed on the notice to appear or be represented at a trial and deliver the offence notice to the office of the court specified in the notice.

## Notice of trial

(2) Where an offence notice is received under subsection (1), the clerk of the court shall, as soon as is practicable, give notice to the defendant and prosecutor of the time and place of the trial. R.S.O. 1990, c. P.33, s. 5.

## Dispute without appearance

6.--(1) Where an offence notice is served on a defendant whose address as shown on the certificate of offence is outside the county or district in which the office of the court specified in the notice is situate, and the defendant wishes to dispute the charge but does not wish to attend or be represented at a trial, the defendant may do so by signifying that intention on the offence notice and delivering the offence notice to the office of the court specified in the notice together with a written dispute setting out with reasonable particularity the defendant's dispute and any facts upon which the defendant relies.

## Disposition

(2) Where an offence notice is delivered under subsection (1), a justice shall, in the absence of the defendant, consider the dispute and,

- (a) where the dispute raises an issue that may constitute a defence, direct a hearing; or

- (b) where the dispute does not raise an issue that may constitute a defence, convict the defendant and impose the set fine.

#### Hearing

(3) Where the justice directs a hearing under subsection (2), the court shall hold the hearing and shall, in the absence of the defendant, consider the evidence in the light of the issues raised in the dispute, and acquit the defendant or convict the defendant and impose the set fine or such lesser fine as is permitted by law.

#### Application of section

(4) This section applies in such part or parts of Ontario as are prescribed by the regulations. R.S.O. 1990, c. P.33, s. 6.

#### Plea of guilty with representations

7.--(1) Where an offence notice is served on a defendant who does not wish to dispute the charge but wishes to make submissions as to penalty, including the extension of time for payment, the defendant may attend at the time and place specified in the notice and may appear before a justice sitting in court for the purpose of pleading guilty to the offence and making submissions as to penalty, and the justice may enter a conviction and impose the set fine or such lesser fine as is permitted by law.

#### Submissions under oath

(2) The justice may require submissions under subsection (1) to be made under oath, orally or by affidavit. R.S.O. 1990, c. P.33, s. 7.

### Payment out of court

8.--(1) Where an offence notice is served on a defendant who does not wish to dispute the charge, the defendant may sign the plea of guilty on the offence notice and deliver the offence notice and amount of the set fine to the office of the court specified in the notice.

### Conviction

(2) Acceptance by the court office of payment under subsection (1) constitutes a plea of guilty whether or not the plea is signed and endorsement of payment on the certificate of offence constitutes the conviction and imposition of a fine in the amount of the set fine for the offence. R.S.O. 1990, c. P.33, s. 8.

### Failure to respond to offence notice

9.--(1) Where at least fifteen days have elapsed after the defendant was served with the offence notice and the offence notice has not been delivered in accordance with section 6 or 8 and a plea of guilty has not been accepted under section 7, the defendant shall be deemed to not wish to dispute the charge and a justice shall examine the certificate of offence and,

- (a) where the certificate of offence is complete and regular on its face, the justice shall enter a conviction in the defendant's absence and without a hearing and impose the set fine for the offence; or
- (b) where the certificate of offence is not complete and regular on its face, the justice shall quash the proceeding.

### Where conviction without proof of by-law

(2) Where a defendant is deemed to not wish to dispute a charge under subsection (1) in respect of an offence under a by-law of a municipality, the justice shall enter a conviction under clause (1) (a) without proof of the by-law that creates the offence if the certificate of offence is complete and regular on its face. R.S.O. 1990, c. P.33, s. 9.

### Signature on plea

10. A signature affixed to the form of plea of guilty or not guilty on an offence notice, purporting to be that of the defendant, is proof, in the absence of evidence to the contrary, that it is the signature of that person. R.S.O. 1990, c. P.33, s. 10.

### Reopening on failure of notice

11.--(1) Where the defendant has not had an opportunity to dispute the charge or to appear or be represented at a hearing for the reason that through no fault of the defendant the delivery of a necessary notice or document failed to occur in fact, and where not more than fifteen days have elapsed since the conviction first came to the attention of the defendant, the defendant may attend at the court office during regular office hours and may appear before a justice and the justice, upon being satisfied by affidavit in the prescribed form of such facts, shall strike out the conviction, if any, and give the person appearing a notice of trial under section 5 or proceed under section 7.

### Certificate of striking out conviction

(2) Where a conviction is struck out under subsection (1), the justice shall give the defendant a certificate of the fact in the prescribed form. R.S.O. 1990, c. P.33, s. 11.



## Penalty

12.--(1) Where the penalty prescribed for an offence includes a fine of more than \$500 or imprisonment and a proceeding is commenced under this Part, the provision for fine or imprisonment does not apply and in lieu thereof the offence is punishable by a fine of not more than the maximum fine prescribed for the offence or \$500, whichever is the lesser.

## Other consequences of conviction

(2) Where a person is convicted of an offence in a proceeding initiated by an offence notice,

- (a) a provision in or under any other Act that provides for an action or result following upon a conviction of an offence does not apply to the conviction, except,
  - (i) for the purpose of carrying out the sentence imposed,
  - (ii) for the purpose of recording and proving the conviction,
  - (iii) for the purposes of the demerit point system under the *Highway Traffic Act*, and
  - (iv) for the purposes of section 47 of the *Highway Traffic Act*; and
- (b) any thing seized in connection with the offence after the service of the offence notice is not liable to forfeiture. R.S.O. 1990, c. P.33, s. 12.

## Regulations

13.--(1) The Lieutenant Governor in Council may make regulations,

- (a) prescribing the form of certificates of offence, offence notices and summonses and such other forms as are considered necessary under this Part;
- (b) authorizing the use in a form prescribed under clause (a) of any word or expression to designate an offence;
- (c) respecting any matter that is considered necessary to provide for the use of the forms under this Part.

## Sufficiency of abbreviated wording

(2) The use on a form prescribed under clause (1) (a) of any word or expression authorized by the regulations to designate an offence is sufficient for all purposes to describe the offence designated by such word or expression.

## Idem

(3) Where the regulations do not authorize the use of a word or expression to describe an offence in a form prescribed under clause (1) (a), the offence may be described in accordance with section 25. R.S.O. 1990, c. P.33, s. 13.

**PART II**  
**COMMENCEMENT OF PROCEEDINGS FOR PARKING INFRACTIONS**

Definition

14. In this Part, "parking infraction" means any unlawful parking, standing or stopping of a vehicle that constitutes an offence. R.S.O. 1990, c. P.33, s. 14.

Commencement of proceeding

15.--(1) In addition to the procedure set out in Part III for commencing a proceeding by laying an information, a proceeding in respect of a parking infraction may be commenced by filing in the office of the court,

- (a) a certificate of parking infraction; and
- (b) where the parking infraction is alleged against the defendant as owner of a vehicle, evidence of the ownership of the vehicle,

within forty-five days after the alleged infraction occurred.

Issuance and notice

(2) A provincial offences officer who believes from his or her personal knowledge that one or more persons have committed a parking infraction may issue, by completing and signing,

- (a) a certificate of parking infraction certifying that a parking infraction has been committed; and
- (b) a parking infraction notice indicating the set fine for the infraction,

in the form prescribed under section 20.

### Municipal by-laws

(3) A provincial offences officer may issue a certificate and notice under subsection (2) in respect of a parking infraction under a by-law of a municipality without including on the certificate or notice a reference to the number of the by-law that creates the offence.

### Service of notice on owner

(4) The issuing provincial offences officer may serve the parking infraction notice on the owner of the vehicle identified therein by affixing it to the vehicle in a conspicuous place at the time of the alleged infraction, or delivering it personally to the person having care and control of the vehicle at the time of the alleged infraction.

### Service of notice on operator

(5) The issuing provincial offences officer may serve the parking infraction notice on the operator of a vehicle by delivering it to the operator personally at the time of the alleged parking infraction.

### Certificate of service

(6) The provincial offences officer who issued the certificate of parking infraction shall certify on the certificate of parking infraction that the officer served the parking infraction notice on the person charged and the date and method of service.

### Certificate as evidence

(7) A certificate of service of a parking infraction notice purporting to be signed by the provincial offences officer issuing it shall be received in evidence and is proof of service in the absence of evidence to the contrary.  
R.S.O. 1990, c. P.33, s. 15.

### Dispute with trial

**16.--**(1) Where a parking infraction notice is served, the defendant may plead not guilty by signing the not guilty plea on the notice and indicate the defendant's desire in the form prescribed on the notice to appear or be represented at a trial and deliver it to the place specified in the notice.

### Notice of trial

(2) Where a parking infraction notice is received under subsection (1), the clerk of the court shall, as soon as is practicable, give notice to the defendant and prosecutor of the time and place of the trial.

### Certificate not invalid without by-law number

(3) Subject to subsection (4), where a certificate of parking infraction is issued for an infraction under a by-law of a municipality, the certificate is not insufficient or irregular by reason only that it does not identify the by-law that creates the offence.

### Exception

(4) Where the defendant delivers a notice under subsection (1), subsection (3) does not apply unless the notice of trial given to the defendant under subsection (2) identifies the by-law. R.S.O. 1990, c. P.33, s. 16.

### Payment out of court

**17.** Where the defendant does not wish to dispute the charge, the defendant may deliver the notice and amount of the set fine to the place shown on the notice. R.S.O. 1990, c. P.33, s. 17.



## Failure to respond to parking infraction notice

18.--(1) Where at least fifteen days have elapsed after the defendant was served with the parking infraction notice and the parking infraction notice has not been delivered in accordance with subsection 16 (1), the defendant shall be deemed to not wish to dispute the charge and a justice shall examine the certificate of parking infraction and where the justice is satisfied,

- (a) that the certificate of parking infraction is complete and regular on its face;
- (b) where the defendant is liable as owner, that the defendant is the owner; and
- (c) that payment has not been made under section 17,

the justice shall enter a conviction in the defendant's absence and without a hearing and impose the set fine for the offence.

## Certificate as evidence

(2) Where a certificate of parking infraction is issued for an infraction under a by-law of a municipality, a certificate purporting to be signed by the clerk of the municipality, or a person designated by the clerk,

- (a) that payment has not been made under section 17; and
- (b) that notice of the defendant's desire to appear or to be represented at trial has not been delivered to the place specified in the parking infraction notice,

shall be received in evidence and is proof of the facts contained therein in the absence of evidence to the contrary.

### Where conviction without proof of by-law

(3) Where a defendant is deemed to not wish to dispute a charge under subsection (1) in respect of a parking infraction under a by-law of a municipality, the justice shall enter a conviction under subsection (1) without proof of the by-law which creates the offence if the justice is satisfied that all other criteria under subsection (1) for entering a conviction have been met.

### Quashing proceeding

(4) Where the justice is not able to enter a conviction under subsection (1), he or she shall quash the proceeding.

### Notice of fine

(5) The clerk of the court shall give notice to the person against whom a conviction is entered under subsection (1) of the date and place of the infraction, the date of the conviction and the amount of the fine. R.S.O. 1990, c. P.33, s. 18.

### Reopening on failure of notice

**19.** Where the defendant has not had an opportunity to dispute the charge or appear or be represented at a hearing for the reason that, through no fault of the defendant, the delivery of a necessary notice or document failed to occur in fact, and where not more than fifteen days have elapsed since the conviction first came to the attention of the defendant, the defendant may attend at the court office during regular office hours and may appear before a justice and the justice, upon being satisfied by affidavit in the prescribed form of such facts, shall strike out the conviction, if any, and give the person appearing a notice of trial under subsection 16 (2) or accept a plea of guilty under section 17. R.S.O. 1990, c. P.33, s. 19.

### Regulations

**20.--(1)** The Lieutenant Governor in Council may make regulations,

- (a) prescribing the form of certificates of parking infractions and parking infraction notices and such other forms as are considered necessary under this Part;
- (b) authorizing the use in a form prescribed under clause (a) of any word or expression to designate a parking infraction;
- (c) respecting any matter that is considered necessary to provide for the use of the forms under this Part.

#### Sufficiency of abbreviations

(2) The use on a form prescribed under clause (1) (a) of any word or expression authorized by the regulations to designate a parking infraction is sufficient for all purposes to describe the infraction designated by such word or expression.

#### Idem

(3) Where the regulations do not authorize the use of a word or expression to describe a parking infraction in a form prescribed under clause (1) (a), the offence may be described in accordance with section 25. R.S.O. 1990, c. P.33, s. 20.

**Note: On a day to be named by proclamation of the Lieutenant Governor, Part II (ss. 14 to 20) is repealed by the Statutes of Ontario, 1992, chapter 20, subsection 1 (1) and the following substituted:**

**PART II**  
**COMMENCEMENT OF PROCEEDINGS FOR PARKING INFRACTIONS**

Definition

**14.** In this Part, "parking infraction" means any unlawful parking, standing or stopping of a vehicle that constitutes an offence.

Proceeding, parking infraction

**14.1** In addition to the procedure set out in Part III for commencing a proceeding by laying an information, a proceeding in respect of a parking infraction may be commenced in accordance with this Part.

Notice issued

**15.--(1)** A provincial offences officer who believes from his or her personal knowledge that one or more persons have committed a parking infraction may issue,

- (a) a certificate of parking infraction certifying that a parking infraction has been committed; and
- (b) a parking infraction notice indicating the set fine for the infraction.

Idem

(2) The provincial offences officer shall complete and sign the certificate and notice in the form prescribed under section 20.

Municipal by-laws

(3) If the alleged infraction is under a by-law of a municipality, it is not necessary to include a reference to the number of the by-law on the certificate or notice.

## Service on owner

(4) The issuing provincial offences officer may serve the parking infraction notice on the owner of the vehicle identified in the notice,

- (a) by affixing it to the vehicle in a conspicuous place at the time of the alleged infraction; or
- (b) by delivering it personally to the person having care and control of the vehicle at the time of the alleged infraction.

## Service on operator

(5) The issuing provincial offences officer may serve the parking infraction notice on the operator of a vehicle by delivering it to the operator personally at the time of the alleged infraction.

## Certificate of service

(6) The issuing provincial offences officer shall certify on the certificate of parking infraction that he or she served the parking infraction notice on the person charged and the date and method of service.

## Certificate as evidence

(7) If it appears that the provincial offences officer who issued a certificate of parking infraction has certified service of the parking infraction notice and signed the certificate, the certificate shall be received in evidence and is proof of service unless there is evidence to the contrary.

## Payment out of court

16. A defendant who does not wish to dispute the charge may deliver the notice and amount of the set fine to the place shown on the notice.



### Dispute with trial

17.--(1) A defendant who wishes to dispute the charge may plead not guilty by signing the not guilty plea on the parking infraction notice, indicating on the notice the defendant's desire to appear or be represented at a trial and delivering the notice to the place shown on it.

### Proceeding commenced

(2) If the defendant pleads not guilty, a proceeding may be commenced in respect of the charge if it is done within seventy-five days after the day the alleged infraction occurred.

### Idem

(3) The proceeding shall be commenced by filing in the office of the court,

- (a) the certificate of parking infraction; and
- (b) if the parking infraction is alleged against the defendant as owner of a vehicle, evidence of the ownership of the vehicle.

### Notice of trial

(4) As soon as practicable after the proceeding is commenced, the clerk of the court shall give notice to the defendant and prosecutor of the time and place of the trial.

### Certificate not invalid without by-law number

(5) A certificate of parking infraction issued for an infraction under a by-law of a municipality is not insufficient or irregular by reason only that it does not identify the by-law that creates the offence if the notice of trial given to the defendant identifies the by-law.

## Failure to respond

**18.--**(1) The person designated by the regulations may give the defendant a notice of impending conviction if,

- (a) at least fifteen days and no more than thirty-five days have elapsed since the alleged infraction occurred;
- (b) the defendant has not paid the fine; and
- (c) a not guilty plea has not been received.

## Contents of notice

(2) The notice of impending conviction shall be in the form prescribed under section 20 and shall indicate the set fine for the infraction and inform the defendant that a conviction will be registered against the defendant unless the defendant pays the set fine or delivers a plea of not guilty to the place set out in the notice.

## Dispute with trial

**18.1--**(1) A defendant who receives a notice of impending conviction and who wishes to dispute the charge may plead not guilty by signing the not guilty plea on the notice, indicating on the notice the defendant's desire to appear or be represented at a trial and delivering the notice to the place shown on it.

## Proceeding commenced

(2) If the defendant pleads not guilty after a notice of impending conviction has been given, a proceeding may be commenced in respect of the charge if it is done within seventy-five days after the day the alleged infraction occurred.

Idem

- (3) The proceeding shall be commenced by filing in the office of the court,
- (a) the certificate of parking infraction; and
  - (b) if the parking infraction is alleged against the defendant as owner of a vehicle, evidence of the ownership of the vehicle.

Notice of trial

(4) As soon as practicable after the proceeding is commenced, the clerk of the court shall give notice to the defendant and prosecutor of the time and place of the trial.

Certificate requesting conviction

**18.2--**(1) If at least fifteen days have elapsed since the defendant was given a notice of impending conviction, the defendant has not paid the fine and a not guilty plea has not been received, the defendant shall be deemed not to dispute the charge and the person designated by the regulations shall prepare and sign a certificate requesting a conviction in the form prescribed under section 20.

Idem

- (2) The certificate requesting a conviction shall state,
- (a) that the certificate of parking infraction is complete and regular on its face;
  - (b) if the defendant is liable as owner, that the person is satisfied that the defendant is the owner;
  - (c) that there is valid legal authority for charging the defendant with the parking infraction;

- (d) that the defendant was given a notice of impending conviction at least fifteen days before the certificate requesting a conviction is filed;
- (e) that the alleged infraction occurred less than seventy-five days before the certificate requesting a conviction is filed; and
- (f) the prescribed information.

Idem

(3) If the certificate of parking infraction was issued for an infraction under a by-law of a municipality, the certificate requesting a conviction shall also state,

- (a) that payment of the set fine has not been made; and
- (b) that notice of the defendant's not guilty plea has not been received.

Idem

(4) A certificate requesting a conviction purporting to be signed by the person authorized to prepare it shall be received in evidence and is proof, in the absence of evidence to the contrary, of the facts contained in it.

Proceeding commenced

(5) A proceeding may be commenced in respect of the charge by filing the certificate requesting a conviction in the office of the court, but only if the certificate is filed within seventy-five days after the alleged infraction occurred.

Determination by clerk

(6) Upon receiving a certificate requesting a conviction, the court shall record a conviction and the defendant is then liable to pay the set fine for the offence.

Application where ticket defective

**18.3--(1)** A defendant who is convicted of a parking infraction under section 18.2 may, within fifteen days after becoming aware of the conviction, apply to a justice requesting that the conviction be struck out for the reason that the parking infraction notice is defective on its face.

Idem

(2) On an application by the defendant, if a justice is satisfied that the parking infraction notice is defective on its face, the justice shall strike out the conviction and shall order that the municipality or other body that issued the certificate requesting a conviction pay \$25 in costs to the defendant.

Alternate procedure

**18.4--(1)** The procedure set out in this section applies in respect of proceedings under this Part only if the regulations provide that it does so and, if the regulations so provide, the procedure set out in sections 18.2 and 18.3 is of no effect.

Proceeding commenced

(2) The defendant shall be deemed not to dispute the charge and a proceeding may be commenced in respect of the charge if,

- (a) at least fifteen days and no more than forty-five days have elapsed since the alleged infraction occurred;
- (b) the defendant has not paid the fine; and
- (c) a not guilty plea has not been received.

Idem

(3) The proceeding shall be commenced by filing,



- (a) the certificate of parking infraction; and
- (b) where the parking infraction is alleged against the defendant as owner of a vehicle, evidence of the ownership of the vehicle.

#### Notice given

(4) The person designated to give the defendant the notice of impending conviction shall certify that the defendant has been given the notice.

#### Certification

(5) If the certificate of parking infraction was issued for an infraction under a by-law of a municipality, the clerk of the municipality or a person designated by the clerk shall certify,

- (a) that payment of the set fine has not been made; and
- (b) that notice of the defendant's not guilty plea has not been received.

#### Idem

(6) A certificate stating the matters set out in clauses (5) (a) and (b) purporting to be signed by the clerk of the municipality or a person designated by the clerk shall be received in evidence and is proof, in the absence of evidence to the contrary, of the facts contained in it.

#### Determination by justice

(7) A justice shall examine the certificate of parking infraction in the defendant's absence and without a hearing.

Idem

(8) The justice shall enter a conviction and impose the set fine for the offence if he or she is satisfied,

- (a) that the certificate of parking infraction is complete and regular on its face;
- (b) if the defendant is liable as owner, that the defendant is the owner; and
- (c) that payment of the set fine has not been made.

Proof of by-law

(9) If a justice is to determine a proceeding in respect of a certificate of parking infraction issued for an infraction under a by-law of a municipality, the justice shall enter a conviction without proof of the by-law that creates the offence if the justice is satisfied that all other criteria for entering a conviction have been met.

Quash proceeding

(10) The justice shall quash the proceeding if he or she is not able to enter a conviction.

Error by municipality

**18.5--**(1) A municipality or other body may apply to a justice requesting that a conviction respecting a parking infraction be struck out if the defendant was convicted because of an error made by the municipality or other body.

Idem

(2) On an application by a municipality or other body, if a justice is satisfied that an error was made, the justice shall strike out the conviction.

Idem

(3) If the justice strikes out the conviction, the municipality or other body shall notify the defendant of that fact.

Municipalities to collect fines

**18.6--**(1) Subject to the regulations, the municipalities authorized to do so by the regulations shall collect and retain for their own purposes the fines levied for convictions respecting parking infractions under their by-laws.

Notice to municipality

(2) If a conviction is entered respecting a parking infraction under a by-law of a municipality to which subsection (1) applies, the clerk of the court shall give notice of the conviction to the clerk of the municipality.

Notice of fine

(3) If the clerk of a municipality receives notice of a conviction, the clerk of the municipality or the person designated by the clerk shall give notice to the person against whom the conviction is entered, in the form prescribed under section 20, setting out the date and place of the infraction, the date of the conviction and the amount of the fine.

If default

(4) If the fine is in default, the clerk of the municipality may send notice to the person designated by the regulations certifying that it is in default.

Idem

(5) If a conviction is entered respecting a parking infraction and the parking infraction is not under a by-law of a municipality to which subsection (1) applies, the clerk of the court shall give notice to the person against whom the conviction is entered of the date and place of the infraction, the date of the conviction and the amount of the fine.

## Application where no notice

**19.--**(1) A defendant who is convicted of a parking infraction without a hearing may, within fifteen days after becoming aware of the conviction, apply to a justice requesting that the conviction be struck out for the reason that, through no fault of the defendant, the defendant never received any notice or document relating to the parking infraction.

## Reopening

(2) On an application by the defendant, if a justice is satisfied of the facts alleged by the defendant, the justice shall strike out the conviction and shall,

- (a) give the person appearing a notice of trial; or
- (b) accept a plea of guilty and impose the set fine.

## Regulations

**20.--**(1) The Lieutenant Governor in Council may make regulations,

- (a) prescribing the forms that are considered necessary under this Part;
- (b) authorizing the use in a form under this Part of any word or expression to designate a parking infraction;
- (c) respecting any matter that is considered necessary to provide for the use of the forms under this Part;
- (d) prescribing information that is required to be included in a parking infraction notice, a notice of impending conviction or a certificate requesting a conviction;
- (e) designating the persons or classes of persons who are required to prepare a notice of impending conviction or a certificate requesting a conviction for municipalities and for

other bodies on whose behalf parking infraction notices are issued;

- (f) providing that the procedure set out in subsections 18.4 (2) to (10) is to apply to all proceedings under this Part;
- (g) authorizing Ontario to pay allowances to municipalities and other bodies that issue notices of impending conviction and that collect fines under this Part, providing for the payment of those allowances from the court costs received in connection with the fines levied under this Part and fixing the amount of the allowances;
- (h) designating the municipalities that are authorized to collect and retain fines for parking infractions, authorizing them to retain the allowances referred to in clause (g) and requiring them to remit the remainder of the court costs to Ontario;
- (i) prescribing the information to be included in a notice certifying that a fine is in default under subsection 18.6 (4) and designating the person to whom the notice is to be sent;
- (j) designating the person or class of persons to make a direction for the purposes of subsection 69 (2.1).

#### Sufficiency of abbreviations

(2) The use on a form prescribed under clause (1) (a) of any word or expression authorized by the regulations to designate a parking infraction is sufficient for all purposes to describe the infraction designated by such word or expression.

#### Idem

(3) Where the regulations do not authorize the use of a word or expression to describe a parking infraction in a form prescribed under clause (1) (a), the offence may be described in accordance with section 25.



See 1992, c. 20, subs. 1 (1) and s. 4.

**Note:** After Part II, as re-enacted by the Statutes of Ontario, 1992, chapter 20, section 1, is proclaimed in force, Part II, as it read immediately before that re-enactment, continues to apply to proceedings that were commenced before that re-enactment. See 1992, c. 20, s. 3.

### **PART III**

#### **COMMENCEMENT OF PROCEEDING BY INFORMATION**

Commencement of proceeding by information

**21.--(1)** In addition to the procedure set out in Parts I and II for commencing a proceeding by the filing of a certificate, a proceeding in respect of an offence may be commenced by laying an information.

Exception

(2) Where a summons or offence notice has been served under Part I, no proceeding shall be commenced under subsection (1) in respect of the same offence except with the consent of the Attorney General or his or her agent. R.S.O. 1990, c. P.33, s. 21.

Summons before information laid

**22.** Where a provincial offences officer believes, on reasonable and probable grounds, that an offence has been committed by a person whom the officer finds at or near the place where the offence was committed, he or she may, before an information is laid, serve the person with a summons in the prescribed form. R.S.O. 1990, c. P.33, s. 22.

Information

**23.--(1)** Any person who, on reasonable and probable grounds, believes that one or more persons have committed an offence, may lay an information in

the prescribed form and under oath before a justice alleging the offence and the justice shall receive the information.

Idem

(2) An information may be laid anywhere in Ontario. R.S.O. 1990, c. P.33, s. 23.

#### Procedure on laying of information

**24.--**(1) A justice who receives an information laid under section 23 shall consider the information and, where he or she considers it desirable to do so, hear and consider in the absence of the defendant the allegations of the informant and the evidence of witnesses and,

- (a) where he or she considers that a case for so doing is made out,
  - (i) confirm the summons served under section 22, if any,
  - (ii) issue a summons in the prescribed form, or
  - (iii) where the arrest is authorized by statute and where the allegations of the informant or the evidence satisfy the justice on reasonable and probable grounds that it is necessary in the public interest to do so, issue a warrant for the arrest of the defendant; or
- (b) where he or she considers that a case for issuing process is not made out,
  - (i) so endorse the information, and

- (ii) where a summons was served under section 22, cancel it and cause the defendant to be so notified.

#### Summons or warrants in blank

(2) A justice shall not sign a summons or warrant in blank. R.S.O. 1990, c. P.33, s. 24.

#### Counts

**25.--**(1) Each offence charged in an information shall be set out in a separate count.

#### Allegation of offence

(2) Each count in an information shall in general apply to a single transaction and shall contain and is sufficient if it contains in substance a statement that the defendant committed an offence therein specified.

#### Reference to statutory provision

(3) Where in a count an offence is identified but the count fails to set out one or more of the essential elements of the offence, a reference to the provision creating or defining the offence shall be deemed to incorporate all the essential elements of the offence.

#### Idem

(4) The statement referred to in subsection (2) may be,

- (a) in popular language without technical averments or allegations of matters that are not essential to be proved;
- (b) in the words of the enactment that describes the offence; or
- (c) in words that are sufficient to give to the defendant notice of the offence with which the defendant is charged.

### More than one count

(5) Any number of counts for any number of offences may be joined in the same information.

### Particulars of count

(6) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the defendant reasonable information with respect to the act or omission to be proved against the defendant and to identify the transaction referred to.

### Sufficiency

(7) No count in an information is insufficient by reason of the absence of details where, in the opinion of the court, the count otherwise fulfils the requirements of this section and, without restricting the generality of the foregoing, no count in an information is insufficient by reason only that,

- (a) it does not name the person affected by the offence or intended or attempted to be affected;
- (b) it does not name the person who owns or has a special property or interest in property mentioned in the count;
- (c) it charges an intent in relation to another person without naming or describing the other person;
- (d) it does not set out any writing that is the subject of the charge;
- (e) it does not set out the words used where words that are alleged to have been used are the subject of the charge;
- (f) it does not specify the means by which the alleged offence was committed;

- (g) it does not name or describe with precision any person, place or thing; or
- (h) it does not, where the consent of a person, official or authority is required before proceedings may be instituted for an offence, state that the consent has been obtained.

Idem

(8) A count is not objectionable for the reason only that,

- (a) it charges in the alternative several different matters, acts or omissions that are stated in the alternative in an enactment that describes as an offence the matters, acts or omissions charged in the count; or
- (b) it is double or multifarious.

Need to negative exception, etc.

(9) No exception, exemption, proviso, excuse or qualification prescribed by law is required to be set out or negated, as the case may be, in an information. R.S.O. 1990, c. P.33, s. 25.

Summons

**26.--(1)** A summons issued under section 22 or 24 shall,

- (a) be directed to the defendant;
- (b) set out briefly the offence in respect of which the defendant is charged; and
- (c) require the defendant to attend court at a time and place stated therein and to attend thereafter as required by the court in order to be dealt with according to law.



## Service

(2) A summons shall be served by a provincial offences officer by delivering it personally to the person to whom it is directed or if that person cannot conveniently be found, by leaving it for the person at the person's last known or usual place of abode with an inmate thereof who appears to be at least sixteen years of age.

## Service outside Ontario

(3) Despite subsection (2), where the person to whom a summons is directed does not reside in Ontario, the summons shall be deemed to have been duly served seven days after it has been sent by registered mail to the person's last known or usual place of abode.

## Service on corporation

(4) Service of a summons on a corporation may be effected by delivering the summons personally,

- (a) in the case of a municipal corporation, to the mayor, warden, reeve or other chief officer of the corporation or to the clerk of the corporation; or
- (b) in the case of any other corporation, to the manager, secretary or other executive officer of the corporation or person apparently in charge of a branch office thereof,

or by mailing the summons by registered mail to the corporation at an address held out by the corporation to be its address, in which case the summons shall be deemed to have been duly served seven days after the day of mailing.

### Substitutional service

(5) A justice, upon motion and upon being satisfied that service cannot be made effectively on a corporation in accordance with subsection (4), may by order authorize another method of service that has a reasonable likelihood of coming to the attention of the corporation.

### Proof of service

(6) Service of a summons may be proved by statement under oath or affirmation, written or oral, of the person who made the service. R.S.O. 1990, c. P.33, s. 26.

### Contents of warrant

**27.--**(1) A warrant issued under section 24 shall,

- (a) name or describe the defendant;
- (b) set out briefly the offence in respect of which the defendant is charged; and
- (c) order that the defendant be forthwith arrested and brought before a justice to be dealt with according to law.

### Idem

(2) A warrant issued under section 24 remains in force until it is executed and need not be made returnable at any particular time. R.S.O. 1990, c. P.33, s. 27.

**PART IV  
TRIAL AND SENTENCING**

**TRIAL**

Application of Part

**28.** This Part applies to a proceeding commenced under this Act. R.S.O. 1990, c. P.33, s. 28.

Territorial jurisdiction

**29.--(1)** Subject to subsection (2), a proceeding in respect of an offence shall be heard and determined by the Ontario Court (Provincial Division) sitting in the county or district in which the offence occurred.

Idem

(2) A proceeding in respect of an offence may be heard and determined in a county or district that adjoins that in which the offence occurred if,

- (a) the court holds sittings in a place reasonably proximate to the place where the offence occurred; and
- (b) the place of sitting referred to in clause (a) is named in the summons or offence notice.

Transfer to proper county

(3) Where a proceeding is taken in a county or district other than one referred to in subsection (1) or (2), the court shall order that the proceeding be transferred to the proper county or district and may where the defendant appears award costs under section 60.

### Change of venue

(4) Where, on the motion of a defendant or prosecutor made to the court at the location named in the information or certificate, it appears to the court that,

- (a) it would be appropriate in the interests of justice to do so; or
- (b) both the defendant and prosecutor consent thereto,

the court may order that the proceeding be heard and determined at another location in Ontario.

### Conditions

(5) The court may, in an order made on a motion by the prosecutor under subsection (3) or (4), prescribe conditions that it thinks proper with respect to the payment of additional expenses caused to the defendant as a result of the change of venue.

### Time of order for change of venue

(6) An order under subsection (3) or (4) may be made even if a motion preliminary to trial has been disposed of or the plea has been taken and it may be made at any time before evidence has been heard.

### Preliminary motions

(7) The court at a location to which a proceeding is transferred under this section may receive and determine any motion preliminary to trial although the same matter was determined by the court at the location from which the proceeding was transferred.

### Delivery of papers

(8) Where an order is made under subsection (3) or (4), the clerk of the court at the location where the trial was to be held before the order was made shall deliver any material in his or her possession in connection with the proceeding forthwith to the clerk of the court at the location where the trial is ordered to be held. R.S.O. 1990, c. P.33, s. 29.

### Justice presiding at trial

30.--(1) The justice presiding when evidence is first taken at the trial shall preside over the whole of the trial.

### When presiding justice unable to act before adjudication

(2) Where evidence has been taken at a trial and, before making his or her adjudication, the presiding justice dies or in his or her opinion or the opinion of the Chief Judge of the Ontario Court (Provincial Division) is for any reason unable to continue, another justice shall conduct the hearing again as a new trial.

### When presiding justice unable to act after adjudication

(3) Where evidence has been taken at a trial and, after making his or her adjudication but before making his or her order or imposing sentence, the presiding justice dies or in his or her opinion or the opinion of the Chief Judge of the Ontario Court (Provincial Division) is for any reason unable to continue, another justice may make the order or impose the sentence that is authorized by law.

### Consent to change presiding justice

(4) A justice presiding at a trial may, at any stage of the trial and upon the consent of the prosecutor and defendant, order that the trial be conducted by another justice and, upon the order being given, subsection (2) applies as if the justice were unable to act. R.S.O. 1990, c. P.33, s. 30.



### Retention of jurisdiction

**31.** The court retains jurisdiction over the information or certificate even if the court fails to exercise its jurisdiction at any particular time or the provisions of this Act respecting adjournments are not complied with. R.S.O. 1990, c. P.33, s. 31.

### Stay of proceeding

**32.--(1)** In addition to his or her right to withdraw a charge, the Attorney General or his or her agent may stay a proceeding at any time before judgment by direction in court to the clerk of the court and thereupon any recognizance relating to the proceeding is vacated.

### Recommencement

(2) A proceeding stayed under subsection (1) may be recommenced by direction of the Attorney General, the Deputy Attorney General or a Crown Attorney to the clerk of the court but a proceeding that is stayed shall not be recommenced,

- (a) later than one year after the stay; or
- (b) after the expiration of any limitation period applicable, which shall run as if the proceeding had not been commenced until the recommencement,

whichever is the earlier. R.S.O. 1990, c. P.33, s. 32.

### Dividing counts

**33.--(1)** A defendant may at any stage of the proceeding make a motion to the court to amend or to divide a count that,

- (a) charges in the alternative different matters, acts or omissions that are stated in the alternative in the enactment that creates or describes the offence; or

- (b) is double or multifarious,

on the ground that, as framed, it prejudices the defendant in the defendant's defence.

Idem

(2) Upon a motion under subsection (1), where the court is satisfied that the ends of justice so require, it may order that a count be amended or divided into two or more counts, and thereupon a formal commencement may be inserted before each of the counts into which it is divided. R.S.O. 1990, c. P.33, s. 33.

Amendment of information or certificate

**34.--**(1) The court may, at any stage of the proceeding, amend the information or certificate as may be necessary if it appears that the information or certificate,

- (a) fails to state or states defectively anything that is requisite to charge the offence;
- (b) does not negative an exception that should be negated; or
- (c) is in any way defective in substance or in form.

Idem

(2) The court may, during the trial, amend the information or certificate as may be necessary if the matters to be alleged in the proposed amendment are disclosed by the evidence taken at the trial.

Variances between charge and evidence

(3) A variance between the information or certificate and the evidence taken on the trial is not material with respect to,

- (a) the time when the offence is alleged to have been committed, if it is proved that the information was laid or certificate issued within the prescribed period of limitation; or
- (b) the place where the subject-matter of the proceeding is alleged to have arisen, except in an issue as to the jurisdiction of the court.

#### Considerations on amendment

(4) The court shall, in considering whether or not an amendment should be made, consider,

- (a) the evidence taken on the trial, if any;
- (b) the circumstances of the case;
- (c) whether the defendant has been misled or prejudiced in the defendant's defence by a variance, error or omission; and
- (d) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

#### Amendment, question of law

(5) The question whether an order to amend an information or certificate should be granted or refused is a question of law.

#### Endorsement of order to amend

(6) An order to amend an information or certificate shall be endorsed on the information or certificate as part of the record and the trial shall proceed as if the information or certificate had been originally laid as amended. R.S.O. 1990, c. P.33, s. 34.

## Particulars

**35.** The court may, before or during trial, if it is satisfied that it is necessary for a fair trial, order that a particular, further describing any matter relevant to the proceeding, be furnished to the defendant. R.S.O. 1990, c. P.33, s. 35.

## Motion to quash information or certificate

**36.--(1)** An objection to an information or certificate for a defect apparent on its face shall be taken by motion to quash the information or certificate before the defendant has pleaded, and thereafter only by leave of the court.

## Grounds for quashing

**(2)** The court shall not quash an information or certificate unless an amendment or particulars under section 33, 34 or 35 would fail to satisfy the ends of justice. R.S.O. 1990, c. P.33, s. 36.

## Costs on amendment or particulars

**37.** Where the information or certificate is amended or particulars are ordered and an adjournment is necessary as a result thereof, the court may make an order under section 60 for costs resulting from the adjournment. R.S.O. 1990, c. P.33, s. 37.

## Joinder of counts or defendants

**38.--(1)** The court may, before trial, where it is satisfied that the ends of justice so require, direct that separate counts, informations or certificates be tried together or that persons who are charged separately be tried together.

## Separate trials

**(2)** The court may, before or during the trial, where it is satisfied that the ends of justice so require, direct that separate counts, informations or certificates be tried separately or that persons who are charged jointly or being tried together be tried separately. R.S.O. 1990, c. P.33, s. 38.

### Issuance of summons

**39.--**(1) Where a justice is satisfied that a person is able to give material evidence in a proceeding under this Act, the justice may issue a summons requiring the person to attend to give evidence and bring with him or her any writings or things referred to in the summons.

### Service

(2) A summons shall be served and the service shall be proved in the same manner as a summons under section 26.

### Attendance

(3) A person who is served with a summons shall attend at the time and place stated in the summons to give evidence and, if required by the summons, shall bring with him or her any writing or other thing that the person has in his or her possession or under his or her control relating to the subject-matter of the proceeding.

### Remaining in attendance

(4) A person who is served with a summons shall remain in attendance during the hearing and the hearing as resumed after adjournment from time to time unless the person is excused from attendance by the presiding justice.  
R.S.O. 1990, c. P.33, s. 39.

### Arrest of witness

**40.--**(1) Where a judge is satisfied upon evidence under oath or affirmation, that a person is able to give material evidence that is necessary in a proceeding under this Act and,

- (a) will not attend if a summons is served; or
- (b) attempts to serve a summons have been made and have failed because the person is evading service,



the judge may issue a warrant in the prescribed form for the arrest of the person.

#### Idem

(2) Where a person who has been served with a summons to attend to give evidence in a proceeding does not attend or remain in attendance, the court may, if it is established,

- (a) that the summons has been served; and
- (b) that the person is able to give material evidence that is necessary,

issue or cause to be issued a warrant in the prescribed form for the arrest of the person.

#### Bringing before justice

(3) The police officer who arrests a person under a warrant issued under subsection (1) or (2) shall immediately take the person before a justice.

#### Release on recognizance

(4) Unless the justice is satisfied that it is necessary to detain a person in custody to ensure his or her attendance to give evidence, the justice shall order the person released upon condition that the person enter into a recognizance in such amount and with such sureties, if any, as are reasonably necessary to ensure his or her attendance.

#### Bringing before judge

(5) Where a person is not released under subsection (4), the justice of the peace shall cause the person to be brought before a judge within two days of the justice's decision.

## Detention

(6) Where the judge is satisfied that it is necessary to detain the person in custody to ensure his or her attendance to give evidence, the judge may order that the person be detained in custody to testify at the trial or to have his or her evidence taken by a commissioner under an order made under subsection (11).

## Release on recognizance

(7) Where the judge does not make an order under subsection (6), he or she shall order that the person be released upon condition that the person enter into a recognizance in such amount and with such sureties, if any, as are reasonably necessary to ensure his or her attendance.

## Maximum imprisonment

(8) A person who is ordered to be detained in custody under subsection (6) or is not released in fact under subsection (7) shall not be detained in custody for a period longer than ten days.

## Release when no longer required

(9) A judge, or the justice presiding at a trial, may at any time order the release of a person in custody under this section where he or she is satisfied that the detention is no longer justified.

## Arrest on breach of recognizance

(10) Where a person who is bound by a recognizance to attend to give evidence in any proceeding does not attend or remain in attendance, the court may issue a warrant in the prescribed form for the arrest of that person and,

- (a) where the person is brought directly before the court, subsections (6) and (7) apply; and

- (b) where the person is not brought directly before the court, subsections (3) to (7) apply.

#### Commission evidence of witness in custody

(11) A judge or the justice presiding at the trial may order that the evidence of a person held in custody under this section be taken by a commissioner under section 43, which applies thereto in the same manner as to a witness who is unable to attend by reason of illness. R.S.O. 1990, c. P.33, s. 40.

#### Order for person in a prison to attend

41.--(1) Where a person whose attendance is required in court to stand trial or to give evidence is confined in a prison, and a judge is satisfied, upon evidence under oath or affirmation orally or by affidavit, that the person's attendance is necessary to satisfy the ends of justice, the judge may issue an order in the prescribed form that the person be brought before the court, from day to day, as may be necessary.

#### Idem

(2) An order under subsection (1) shall be addressed to the person who has custody of the prisoner and on receipt thereof that person shall,

- (a) deliver the prisoner to the police officer or other person who is named in the order to receive the prisoner; or
- (b) bring the prisoner before the court upon payment of the person's reasonable charges in respect thereof.

#### Idem

(3) An order made under subsection (1) shall direct the manner in which the person shall be kept in custody and returned to the prison from which he or she is brought. R.S.O. 1990, c. P.33, s. 41.

### Penalty for failure to attend

**42.--**(1) Every person who, being required by law to attend or remain in attendance at a hearing, fails without lawful excuse to attend or remain in attendance accordingly is guilty of an offence and on conviction is liable to a fine of not more than \$2,000, or to imprisonment for a term of not more than thirty days, or to both.

### Proof of failure to attend

(2) In a proceeding under subsection (1), a certificate of the clerk of the court or a justice stating that the defendant failed to attend is admissible in evidence as proof, in the absence of evidence to the contrary, of the fact without proof of the signature or office of the person appearing to have signed the certificate. R.S.O. 1990, c. P.33, s. 42.

### Order for evidence by commission

**43.--**(1) Upon the motion of the defendant or prosecutor, a judge or, during trial, the court may by order appoint a commissioner to take the evidence of a witness who is out of Ontario or is not likely to be able to attend the trial by reason of illness or physical disability or for some other good and sufficient cause.

### Admission of commission evidence

(2) Evidence taken by a commissioner appointed under subsection (1) may be read in evidence in the proceeding if,

- (a) it is proved by oral evidence or by affidavit that the witness is unable to attend for a reason set out in subsection (1);
- (b) the transcript of the evidence is signed by the commissioner by or before whom it purports to have been taken; and
- (c) it is proved to the satisfaction of the court that reasonable notice of the time and place for taking the evidence was given

to the other party, and the party had full opportunity to cross-examine the witness.

#### Attendance of accused

(3) An order under subsection (1) may make provision to enable the defendant to be present or represented by counsel or agent when the evidence is taken, but failure of the defendant to be present or to be represented by counsel or agent in accordance with the order does not prevent the reading of the evidence in the proceeding if the evidence has otherwise been taken in accordance with the order and with this section.

#### Application of rules in civil cases

(4) Except as otherwise provided by this section or by the rules of court, the practice and procedure in connection with the appointment of commissioners under this section, the taking of evidence by commissioners, the certifying and return thereof, and the use of the evidence in the proceeding shall, as far as possible, be the same as those that govern like matters in civil proceedings in the Ontario Court (General Division). R.S.O. 1990, c. P.33, s. 43.

#### Trial of issue as to capacity to conduct defence

44.--(1) Where at any time before a defendant is sentenced a court has reason to believe, based on,

- (a) the evidence of a legally qualified medical practitioner or, with the consent of the parties, a written report of a legally qualified medical practitioner; or
- (b) the conduct of the defendant in the courtroom,

that the defendant suffers from mental disorder, the court may,

- (c) where the justice presiding is a judge, by order suspend the proceeding and direct the trial of the issue as to whether the



defendant is, because of mental disorder, unable to conduct his or her defence; or

- (d) where the justice presiding is a justice of the peace, refer the matter to a judge who may make an order referred to in clause (c).

#### Examination

(2) For the purposes of subsection (1), the court may order the defendant to attend to be examined under subsection (5).

#### Finding

(3) The trial of the issue shall be presided over by a judge and,

- (a) where the judge finds that the defendant is, because of mental disorder, unable to conduct his or her defence, the judge shall order that the proceeding remain suspended;
- (b) where the judge finds that the defendant is able to conduct his or her defence, the judge shall order that the suspended proceeding be continued.

#### Application for rehearing as to capacity

(4) At any time within one year after an order is made under subsection (3), either party may, upon seven days notice to the other, make a motion to a judge to rehear the trial of the issue and where upon the rehearing the judge finds that the defendant is able to conduct his or her defence, the judge may order that the suspended proceeding be continued.

#### Order for examination

(5) For the purposes of subsection (1) or a hearing or rehearing under subsection (3) or (4), the court or judge may order the defendant to attend at such place or before such person and at or within such time as are specified

in the order and submit to an examination for the purpose of determining whether the defendant is, because of mental disorder, unable to conduct his or her defence.

#### Idem

(6) Where the defendant fails or refuses to comply with an order under subsection (5) without reasonable excuse or where the person conducting the examination satisfies a judge that it is necessary to do so, the judge may by warrant direct that the defendant be taken into such custody as is necessary for the purpose of the examination and in any event for not longer than seven days and, where it is necessary to detain the defendant in a place, the place shall be, where practicable, a psychiatric facility.

#### Limitation on suspension of proceeding

(7) Where an order is made under subsection (3) and one year has elapsed and no further order is made under subsection (4), no further proceeding shall be taken in respect of the charge or any other charge arising out of the same circumstance. R.S.O. 1990, c. P.33, s. 44.

#### Taking of plea

**45.--**(1) After being informed of the substance of the information or certificate, the defendant shall be asked whether the defendant pleads guilty or not guilty of the offence charged therein.

#### Conviction on plea of guilty

(2) Where the defendant pleads guilty, the court may accept the plea and convict the defendant.

#### Refusal to plead

(3) Where the defendant refuses to plead or does not answer directly, the court shall enter a plea of not guilty.

### Plea of guilty to another offence

(4) Where the defendant pleads not guilty of the offence charged but guilty of any other offence, whether or not it is an included offence, the court may, with the consent of the prosecutor, accept such plea of guilty and accordingly amend the information or substitute the offence to which the defendant pleads guilty. R.S.O. 1990, c. P.33, s. 45.

### Trial on plea of not guilty

46.--(1) Subject to section 6, where the defendant pleads not guilty, the court shall hold the trial.

### Right to defend

(2) The defendant is entitled to make full answer and defence.

### Right to examine witnesses

(3) The prosecutor or defendant, as the case may be, may examine and cross-examine witnesses.

### Agreed facts

(4) The court may receive and act upon any facts agreed upon by the defendant and prosecutor without proof or evidence.

### Defendant not compellable

(5) Despite section 8 of the *Evidence Act*, the defendant is not a compellable witness for the prosecution. R.S.O. 1990, c. P.33, s. 46.

### Evidence taken on another charge

47.--(1) The court may receive and consider evidence taken before the same justice on a different charge against the same defendant, with the consent of the parties.

### Certificate as evidence

(2) Where a certificate as to the content of an official record is, by any Act, made admissible in evidence as proof, in the absence of evidence to the contrary, the court may, for the purpose of deciding whether the defendant is the person referred to in the certificate, receive and base its decision upon information it considers credible or trustworthy in the circumstances of each case.

### Burden of proving exception, etc.

(3) The burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the authorization, exception, exemption or qualification does not operate in favour of the defendant, whether or not it is set out in the information. R.S.O. 1990, c. P.33, s. 47.

### Exhibits

48.--(1) The court may order that an exhibit be kept in such custody and place as, in the opinion of the court, is appropriate for its preservation.

### Release of exhibits

(2) Where any thing is filed as an exhibit in a proceeding, the clerk may release the exhibit upon the consent of the parties at any time after the trial or, in the absence of consent, may return the exhibit to the party tendering it after the disposition of any appeal in the proceeding or, where an appeal is not taken, after the expiration of the time for appeal. R.S.O. 1990, c. P.33, s. 48.

### Adjournments

49.--(1) The court may, from time to time, adjourn a trial or hearing but, where the defendant is in custody, an adjournment shall not be for a period longer than eight days without the consent of the defendant.

### Early resumption

(2) A trial or hearing that is adjourned for a period may be resumed before the expiration of the period with the consent of the defendant and the prosecutor. R.S.O. 1990, c. P.33, s. 49.

### Appearance by defendant

**50.--**(1) A defendant may appear and act personally or by counsel or agent.

### Appearance by corporation

(2) A defendant that is a corporation shall appear and act by counsel or agent.

### Exclusion of agents

(3) The court may bar any person from appearing as an agent who is not a barrister and solicitor entitled to practise in Ontario if the court finds that the person is not competent properly to represent or advise the person for whom he or she appears as agent or does not understand and comply with the duties and responsibilities of an agent. R.S.O. 1990, c. P.33, s. 50.

### Compelling attendance of defendant

**51.** Although a defendant appears by counsel or agent, the court may order the defendant to attend personally, and, where it appears to be necessary to do so, may issue a summons in the prescribed form. R.S.O. 1990, c. P.33, s. 51.

### Excluding defendant from hearing

**52.--**(1) The court may cause the defendant to be removed and to be kept out of court,



- (a) when the defendant misconducts himself or herself by interrupting the proceeding so that to continue in the presence of the defendant would not be feasible; or
- (b) where, during the trial of an issue as to whether the defendant is, because of mental disorder, unable to conduct his or her defence, the court is satisfied that failure to do so might have an adverse effect on the mental health of the defendant.

#### Excluding public from hearing

(2) The court may exclude the public or any member of the public from a hearing where, in the opinion of the court, it is necessary to do so,

- (a) for the maintenance of order in the courtroom;
- (b) to protect the reputation of a minor; or
- (c) to remove an influence that might affect the testimony of a witness.

#### Prohibition of publication of evidence

(3) Where the court considers it necessary to do so to protect the reputation of a minor, the court may make an order prohibiting the publication or broadcast of the identity of the minor or of the evidence or any part of the evidence taken at the hearing. R.S.O. 1990, c. P.33, s. 52.

#### Failure of prosecutor to appear

**53.--**(1) Where the defendant appears for a hearing and the prosecutor, having had due notice, does not appear, the court may dismiss the charge or may adjourn the hearing to another time upon such terms as it considers proper.

## Idem

(2) Where the prosecutor does not appear at the time and place appointed for the resumption of an adjourned hearing under subsection (1), the court may dismiss the charge.

## Costs

(3) Where a hearing is adjourned under subsection (1) or a charge is dismissed under subsection (2), the court may make an order under section 60 for the payment of costs.

## Written order of dismissal

(4) Where a charge is dismissed under subsection (1) or (2), the court may, if requested by the defendant, draw up an order of dismissal stating the grounds therefor and shall give the defendant a certified copy of the order of dismissal which is, without further proof, a bar to any subsequent proceeding against the defendant in respect of the same cause. R.S.O. 1990, c. P.33, s. 53.

## Conviction in the absence of the defendant

**54.--**(1) Where a defendant does not appear at the time and place appointed for a hearing and it is proved by the prosecutor, having been given a reasonable opportunity to do so, that a summons was served, a notice of trial was given under Part I or II, an undertaking to appear was given or a recognizance to appear was entered into, as the case may be, or where the defendant does not appear upon the resumption of a hearing that has been adjourned, the court,

- (a) may proceed to hear and determine the proceeding in the absence of the defendant;
- (b) may, if it thinks fit, adjourn the hearing and issue a summons to appear or issue a warrant in the prescribed form for the arrest of the defendant; or

- (c) may, where the defendant does not appear in response to the summons or warrant on the date to which the hearing is adjourned, proceed under clause (a) or (b).

#### Proceeding arising from failure to appear

(2) Where the court proceeds under clause (1) (a), no proceeding arising out of the failure of the defendant to appear at the time and place appointed for the hearing or for the resumption of the hearing shall be instituted or if instituted shall be proceeded with, except with the consent of the Attorney General or his or her agent. R.S.O. 1990, c. P.33, s. 54.

#### Included offences

55. Where the offence as charged includes another offence, the defendant may be convicted of an offence so included that is proved, although the whole offence charged is not proved. R.S.O. 1990, c. P.33, s. 55.

### SENTENCING

#### Pre-sentence report

56.--(1) Where a defendant is convicted of an offence in a proceeding commenced by information, the court may direct a probation officer to prepare and file with the court a report in writing relating to the defendant for the purpose of assisting the court in imposing sentence.

#### Service

(2) Where a report is filed with the court under subsection (1), the clerk of the court shall cause a copy of the report to be provided to the defendant or the defendant's counsel or agent and to the prosecutor. R.S.O. 1990, c. P.33, s. 56.

- (a) to the court or prosecutor by the defendant; or
- (b) to the defendant by the person who laid the information or issued the certificate, as the case may be,

but where the proceeding is commenced by means of a certificate, the total of such costs shall not exceed \$100.

#### Costs collectable as a fine

(3) Costs payable under this section shall be deemed to be a fine for the purpose of enforcing payment. R.S.O. 1990, c. P.33, s. 60.

#### General penalty

**61.** Except where otherwise expressly provided by law, every person who is convicted of an offence is liable to a fine of not more than \$5,000. R.S.O. 1990, c. P.33, s. 61.

#### Minute of conviction

**62.** Where a court convicts a defendant or dismisses a charge, a minute of the dismissal or conviction and sentence shall be made by the court, and, upon request by the defendant or the prosecutor or by the Attorney General or his or her agent, the court shall cause a copy thereof certified by the clerk of the court to be delivered to the person making the request. R.S.O. 1990, c. P.33, s. 62.

#### Time when imprisonment starts

**63.--(1)** The term of imprisonment imposed by sentence shall, unless otherwise directed in the sentence, commence on the day on which the convicted person is taken into custody thereunder, but no time during which the convicted person is imprisoned or out on bail before sentence shall be reckoned as part of the term of imprisonment to which he or she is sentenced.

Idem

(2) Where the court imposes imprisonment, the court may order custody to commence on a day not later than thirty days after the day of sentencing. R.S.O. 1990, c. P.33, s. 63.

#### Sentences consecutive

**64.** Where a person is subject to more than one term of imprisonment at the same time, the terms shall be served consecutively except in so far as the court has ordered a term to be served concurrently with any other term of imprisonment. R.S.O. 1990, c. P.33, s. 64.

#### Authority of warrant

**65.--(1)** A warrant of committal is sufficient authority,

- (a) for the conveyance of the prisoner in custody for the purpose of committal under the warrant; and
- (b) for the reception and detention of the prisoner by keepers of prisons in accordance with the terms of the warrant.

#### Conveyance of prisoner

(2) A person to whom a warrant of committal is directed shall convey the prisoner to the correctional institution named in the warrant.

#### Prisoner subject to rules of institution

(3) A sentence of imprisonment shall be served in accordance with the enactments and rules that govern the institution to which the prisoner is sentenced. R.S.O. 1990, c. P.33, s. 65.

#### When fine due

**66.--(1)** A fine becomes due and payable fifteen days after its imposition.



## Submissions as to sentence

57.--(1) Where a defendant who appears is convicted of an offence, the court shall give the prosecutor and the counsel or agent for the defendant an opportunity to make submissions as to sentence and, where the defendant has no counsel or agent, the court shall ask the defendant if he or she has anything to say before sentence is passed.

## Omission to comply

(2) The omission to comply with subsection (1) does not affect the validity of the proceeding.

## Inquiries by court

(3) Where a defendant is convicted of an offence, the court may make such inquiries, on oath or otherwise, of and concerning the defendant as it considers desirable, including the defendant's economic circumstances, but the defendant shall not be compelled to answer.

## Proof of previous conviction

(4) A certificate setting out with reasonable particularity the finding of guilt or acquittal or conviction and sentence in Canada of a person signed by,

- (a) the person who made the adjudication; or
- (b) the clerk of the court where the adjudication was made,

is, upon the court being satisfied that the defendant is the person referred to in the certificate, admissible in evidence and is proof, in the absence of evidence to the contrary, of the facts stated therein without proof of the signature or the official character of the person appearing to have signed the certificate. R.S.O. 1990, c. P.33, s. 57.

## Time spent in custody considered

**58.** In determining the sentence to be imposed on a person convicted of an offence, the justice may take into account any time spent in custody by the person as a result of the offence. R.S.O. 1990, c. P.33, s. 58.

## Provision for minimum penalty

**59.--(1)** No penalty prescribed for an offence is a minimum penalty unless it is specifically declared to be a minimum.

## Relief against minimum fine

(2) Although the provision that creates the penalty for an offence prescribes a minimum fine, where in the opinion of the court exceptional circumstances exist so that to impose the minimum fine would be unduly oppressive or otherwise not in the interests of justice, the court may impose a fine that is less than the minimum or suspend the sentence.

## Idem, re imprisonment

(3) Where a minimum penalty is prescribed for an offence and the minimum penalty includes imprisonment, the court may, despite the prescribed penalty, impose a fine of not more than \$5,000 in lieu of imprisonment. R.S.O. 1990, c. P.33, s. 59.

## Fixed costs on conviction

**60.--(1)** Upon conviction, the defendant is liable to pay to the court an amount by way of costs that is fixed by the regulations.

## Costs respecting witnesses

(2) The court may, in its discretion, order costs towards fees and expenses reasonably incurred by or on behalf of witnesses in amounts not exceeding the maximum fixed by the regulations, to be paid,

### Extension of time for payment of a fine

(2) Where the court imposes a fine, the court shall ask the defendant if the defendant wishes an extension of the time for payment of the fine.

### Inquiries

(3) Where the defendant requests an extension of the time for payment of the fine, the court may make such inquiries, on oath or affirmation or otherwise, of and concerning the defendant as the court considers desirable, but the defendant shall not be compelled to answer.

### Granting of extension

(4) Unless the court finds that the request for extension of time is not made in good faith or that the extension would likely be used to evade payment, the court shall extend the time for payment by ordering periodic payments or otherwise.

### Notice where convicted in the absence of the defendant

(5) Where a fine is imposed in the absence of the defendant, the clerk of the court shall give the defendant notice of the fine and its due date and of the defendant's right to make a motion for an extension of the time for payment under subsection (6).

### Further motion for extension

(6) The defendant may, at any time by motion in the prescribed form filed in the office of the court, request an extension or further extension of time for payment of a fine and the motion shall be determined by a justice and the justice has the same powers in respect of the motion as the court has under subsections (3) and (4). R.S.O. 1990, c. P.33, s. 66.

### Regulation for work credits for fines

67. The Lieutenant Governor in Council may make regulations establishing a program to permit the payment of fines by means of credits for work performed, and, for the purpose and without restricting the generality of the foregoing may,

- (a) prescribe classes of work and the conditions under which they are to be performed;
- (b) prescribe a system of credits;
- (c) provide for any matter necessary for the effective administration of the program,

and any regulation may limit its application to any part or parts of Ontario.  
R.S.O. 1990, c. P.33, s. 67.

### Civil enforcement of fines

68.--(1) When the payment of a fine is in default, the clerk of the court may complete a certificate in the prescribed form as to the imposition of the fine and the amount remaining unpaid and file the certificate in a court of competent jurisdiction and upon filing, the certificate shall be deemed to be an order or judgment of that court for the purposes of enforcement.

### Limitation

(2) A certificate shall not be filed under subsection (1) after two years after the default in respect of which it is issued.

### Certificate of discharge

(3) Where a certificate has been filed under subsection (1) and the fine is fully paid, the clerk shall file a certificate of payment upon which the certificate of default is discharged and, where a writ of execution has been filed with the

sheriff, the clerk shall file a certificate of payment with the sheriff, upon which the writ is cancelled. R.S.O. 1990, c. P.33, s. 68.

#### Default

**69.--(1)** The payment of a fine is in default when any part of the fine is due and unpaid for fifteen days or more.

#### Order on default

(2) Where a justice is satisfied that payment of a fine is in default, the justice,

- (a) shall order that any permit, licence, registration or privilege in respect of which a suspension is authorized by or under any Act for non-payment of the fine be suspended, not renewed or not issued until the fine is paid; and
- (b) may direct the clerk of the court to proceed with civil enforcement under section 68.

**Note:** On a day to be named by proclamation of the Lieutenant Governor, section 69 is amended by the Statutes of Ontario, 1992, chapter 20, subsection 1 (2) by adding the following subsection:

#### Parking infraction default

(2.1) Where the person designated by the regulations is satisfied that payment of a fine for a parking infraction is in default, the person shall direct that any permit issued to the defendant under Part II of the *Highway Traffic Act* be not validated or not issued until the fine is paid.

**See 1992, c. 20, subs. 1 (2) and s. 4.**



## Imprisonment for non-payment of fine

(3) A justice may issue a warrant in the prescribed form for the committal of the defendant where,

- (a) an order or direction under clause (2) (a) has not resulted in payment within a time that is reasonable in the circumstances;
- (b) all other reasonable methods of collecting the fine have been tried and failed or, in the opinion of the justice, would not likely result in payment within a reasonable time in the circumstances; and
- (c) the defendant has been given fifteen days notice of the intent to issue a warrant and has had an opportunity to be heard.

**Note: On a day to be named by proclamation of the Lieutenant Governor, section 69 is amended by the Statutes of Ontario, 1992, chapter 20, subsection 1 (2) by adding the following subsection:**

## Exception

(3.1) Subsection (3) does not apply where the fine in default is in respect of a conviction for a parking infraction under section 18.2.

**See 1992, c. 20, subs. 1 (2) and s. 4.**

## Provision on conviction for imprisonment in default

(4) In exceptional circumstances where, in the opinion of the court imposing the fine, to proceed under subsection (3) would defeat the ends of justice, the court may,

- (a) order that no warrant of committal be issued under subsection (3); or

- (b) order imprisonment in default of payment of the fine and that no extension of time for payment be granted.

#### Term of imprisonment

(5) Imprisonment under a warrant issued under subsection (3) or (4) shall be for three days, plus one day for each \$50 or part thereof that is in default, subject to a maximum period of,

- (a) ninety days; or
- (b) half of the maximum imprisonment, if any, provided for the offence,

whichever is the greater.

#### Effect of payments

(6) Any payment made after a warrant is issued under subsection (3) or (4) shall reduce the term by the number of days that is in the same proportion to the number of days in the term as the amount paid bears to the amount in default and no amount offered in part payment of a fine shall be accepted unless it is sufficient to secure reduction of sentence of one day, or a multiple thereof. R.S.O. 1990, c. P.33, s. 69.

#### Fee where fine in default

**70.--**(1) Where the payment of a fine is in default and the time for payment is not extended or further extended under subsection 66 (6), the defendant shall pay the administrative fee prescribed by the regulations.

#### Fee collectable as a fine

(2) For the purpose of making and enforcing payment, a fee payable under this section shall be deemed to be part of the fine that is in default. R.S.O. 1990, c. P.33, s. 70.

## Suspension of fine on conditions

**71.** Where an Act provides that a fine may be suspended subject to the performance of a condition,

- (a) the period of suspension shall be fixed by the court and shall be for not more than one year;
- (b) the court shall provide in its order of suspension the method of proving the performance of the condition;
- (c) the suspension is in addition to and not in lieu of any other power of the court in respect of the fine; and
- (d) the fine is not in default until fifteen days have elapsed after notice that the period of suspension has expired is given to the defendant. R.S.O. 1990, c. P.33, s. 71.

## Probation order

**72.--(1)** Where a defendant is convicted of an offence in a proceeding commenced by information, the court may, having regard to the age, character and background of the defendant, the nature of the offence and the circumstances surrounding its commission,

- (a) suspend the passing of sentence and direct that the defendant comply with the conditions prescribed in a probation order;
- (b) in addition to fining the defendant or sentencing the defendant to imprisonment, whether in default of payment of a fine or otherwise, direct that the defendant comply with the conditions prescribed in a probation order; or
- (c) where it imposes a sentence of imprisonment on the defendant, whether in default of payment of a fine or otherwise, that does not exceed ninety days, order that the sentence be served intermittently at such times as are

specified in the order and direct that the defendant, at all times when he or she is not in confinement pursuant to such order, comply with the conditions prescribed in a probation order.

#### Statutory conditions of order

(2) A probation order shall be deemed to contain the conditions that,

- (a) the defendant not commit the same or any related or similar offence, or any offence under a statute of Canada or Ontario or any other province of Canada that is punishable by imprisonment;
- (b) the defendant appear before the court as and when required; and
- (c) the defendant notify the court of any change in the defendant's address.

#### Conditions imposed by court

(3) In addition to the conditions set out in subsection (2), the court may prescribe as a condition in a probation order,

- (a) that the defendant satisfy any compensation or restitution that is required or authorized by an Act;
- (b) with the consent of the defendant and where the conviction is of an offence that is punishable by imprisonment, that the defendant perform a community service as set out in the order;
- (c) where the conviction is of an offence punishable by imprisonment, such other conditions relating to the circumstances of the offence and of the defendant that contributed to the commission of the offence as the court

considers appropriate to prevent similar unlawful conduct or to contribute to the rehabilitation of the defendant; or

- (d) where considered necessary for the purpose of implementing the conditions of the probation order, that the defendant report to a responsible person designated by the court and, in addition, where the circumstances warrant it, that the defendant be under the supervision of the person to whom he or she is required to report.

#### Form of order

(4) A probation order shall be in the prescribed form and the court shall specify therein the period for which it is to remain in force, which shall not be for more than two years from the date when the order takes effect.

#### Notice of order

(5) Where the court makes a probation order, it shall cause a copy of the order and a copy of section 75 to be given to the defendant.

#### Regulations for community service orders

(6) The Lieutenant Governor in Council may make regulations governing restitution, compensation and community service orders, including their terms and conditions. R.S.O. 1990, c. P.33, s. 72.

#### When order comes into force

**73.--**(1) A probation order comes into force,

- (a) on the date on which the order is made; or
- (b) where the defendant is sentenced to imprisonment other than a sentence to be served intermittently, upon the expiration of that sentence.



### Continuation in force

(2) Subject to section 75, where a defendant who is bound by a probation order is convicted of an offence or is imprisoned in default of payment of a fine, the order continues in force except in so far as the sentence or imprisonment renders it impossible for the defendant to comply for the time being with the order. R.S.O. 1990, c. P.33, s. 73.

### Variation of probation order

**74.** The court may, at any time upon the application of the defendant or prosecutor with notice to the other, after a hearing or, with the consent of the parties, without a hearing,

- (a) make any changes in or additions to the conditions prescribed in the order that in the opinion of the court are rendered desirable by a change in circumstances;
- (b) relieve the defendant, either absolutely or upon such terms or for such period as the court considers desirable, of compliance with any condition described in any of the clauses in subsection 72 (3) that is prescribed in the order; or
- (c) terminate the order or decrease the period for which the probation order is to remain in force,

and the court shall thereupon endorse the probation order accordingly and, if it changes or adds to the conditions prescribed in the order, inform the defendant of its action and give the defendant a copy of the order so endorsed. R.S.O. 1990, c. P.33, s. 74.

### Breach of probation order

**75.** Where a defendant who is bound by a probation order is convicted of an offence constituting a breach of condition of the order and,

- (a) the time within which the defendant may appeal or make a motion for leave to appeal against that conviction has expired and the defendant has not taken an appeal or made a motion for leave to appeal;
- (b) the defendant has taken an appeal or made a motion for leave to appeal against the conviction and the appeal or motion for leave has been dismissed or abandoned; or
- (c) the defendant has given written notice to the court that convicted the defendant that the defendant elects not to appeal,

or where the defendant otherwise wilfully fails or refuses to comply with the order, the defendant is guilty of an offence and upon conviction the court may,

- (d) impose a fine of not more than \$1,000 or imprisonment for a term of not more than thirty days, or both, and in lieu of or in addition to the penalty, continue the probation order with such changes or additions and for such extended term, not exceeding an additional year, as the court considers reasonable; or
- (e) where the justice presiding is the justice who made the original order, in lieu of imposing the penalty under clause (d), revoke the probation order and impose the sentence the passing of which was suspended upon the making of the probation order. R.S.O. 1990, c. P.33, s. 75.

**PART V**  
**GENERAL PROVISIONS**

Limitation

**76.--**(1) A proceeding shall not be commenced after the expiration of any limitation period prescribed by or under any Act for the offence or, where no limitation period is prescribed, after six months after the date on which the offence was, or is alleged to have been, committed.

Extension

(2) A limitation period may be extended by a justice with the consent of the defendant. R.S.O. 1990, c. P.33, s. 76.

Parties to offence

**77.--**(1) Every person is a party to an offence who,

- (a) actually commits it,
- (b) does or omits to do anything for the purpose of aiding any person to commit it; or
- (c) abets any person in committing it.

Common purpose

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to the offence. R.S.O. 1990, c. P.33, s. 77.

## Counselling

78.--(1) Where a person counsels or procures another person to be a party to an offence and that other person is afterwards a party to the offence, the person who counselled or procured is a party to the offence, even if the offence was committed in a way different from that which was counselled or procured.

## Idem

(2) Every person who counsels or procures another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling or procuring that the person who counselled or procured knew or ought to have known was likely to be committed in consequence of the counselling or procuring. R.S.O. 1990, c. P.33, s. 78.

## Computation of age

79. In the absence of other evidence, or by way of corroboration of other evidence, a justice may infer the age of a person from his or her appearance. R.S.O. 1990, c. P.33, s. 79.

## Common law defences

80. Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of offences, except in so far as they are altered by or inconsistent with this or any other Act. R.S.O. 1990, c. P.33, s. 80.

## Ignorance of the law

81. Ignorance of the law by a person who commits an offence is not an excuse for committing the offence. R.S.O. 1990, c. P.33, s. 81.

### Counsel or agent

82. A defendant may act by counsel or agent. R.S.O. 1990, c. P.33, s. 82.

### Recording of evidence

83.--(1) A proceeding in which evidence is taken shall be recorded.

### Evidence under oath or affirmation

(2) Evidence under this Act shall be taken under oath or affirmation, except as otherwise provided by law. R.S.O. 1990, c. P.33, s. 83.

### Interpreters

84.--(1) A justice may authorize a person to act as interpreter in a proceeding before the justice where the person swears the prescribed oath and, in the opinion of the justice, is competent.

### Idem

(2) A judge may authorize a person to act as interpreter in proceedings under this Act where the person swears the prescribed oath and, in the opinion of the judge is competent and likely to be readily available. R.S.O. 1990, c. P.33, s. 84.

### Extension of time

85. Any time prescribed by this Act or the regulations made thereunder or by the rules of court for doing any thing other than commencing or recommencing a proceeding may be extended by the court, whether or not the prescribed time has expired. R.S.O. 1990, c. P.33, s. 85.

### Penalty for false statements

86. Every person who makes an assertion of fact in a statement or entry in a document or form for use under this Act knowing that the assertion is false



is guilty of an offence and on conviction is liable to a fine of not more than \$2,000. R.S.O. 1990, c. P.33, s. 86.

#### Delivery

**87.--**(1) Except as otherwise provided by this Act or the rules of court, any notice or document required or authorized to be given or delivered under this Act or the rules of court is sufficiently given or delivered if delivered, whether personally or by mail.

#### Idem

(2) Where a notice or document that is required or authorized to be given or delivered to a person under this Act is mailed to the person at the person's last known address appearing on the records of the court in the proceeding, there is a rebuttable presumption that the notice or document is delivered to the person. R.S.O. 1990, c. P.33, s. 87.

#### Civil remedies preserved

**88.** No civil remedy for an act or omission is suspended or affected for the reason that the act or omission is an offence. R.S.O. 1990, c. P.33, s. 88.

#### Process on holidays

**89.** Any action authorized or required by this Act is not invalid for the reason only that the action was taken on a non-judicial day. R.S.O. 1990, c. P.33, s. 89.

#### Irregularities in form

**90.--**(1) The validity of any proceeding is not affected by,

- (a) any irregularity or defect in the substance or form of the summons, warrant, offence notice, parking infraction notice, undertaking to appear or recognizance; or

- (b) any variance between the charge set out in the summons, warrant, parking infraction notice, offence notice, undertaking to appear or recognizance and the charge set out in the information or certificate.

#### Adjournment to meet irregularities

(2) Where it appears to the court that the defendant has been misled by any irregularity, defect or variance mentioned in subsection (1), the court may adjourn the hearing and may make such order as the court considers appropriate, including an order under section 60 for the payment of costs. R.S.O. 1990, c. P.33, s. 90.

#### Contempt

**91.--**(1) Except as otherwise provided by an Act, every person who commits contempt in the face of a justice of the peace presiding over the Ontario Court (Provincial Division) in a proceeding under this Act is on conviction liable to a fine of not more than \$1,000 or to imprisonment for a term of not more than thirty days, or to both.

#### Statement to offender

(2) Before a proceeding is taken for contempt under subsection (1), the justice of the peace shall inform the offender of the conduct complained of and the nature of the contempt and inform him or her of the right to show cause why he or she should not be punished.

#### Show cause

(3) A punishment for contempt in the face of the court shall not be imposed without giving the offender an opportunity to show cause why he or she should not be punished.

### Adjournment for adjudication

(4) Except where, in the opinion of the justice of the peace, it is necessary to deal with the contempt immediately for the preservation of order and control in the courtroom, the justice of the peace shall adjourn the contempt proceeding to another day.

### Adjudication by judge

(5) A contempt proceeding that is adjourned to another day under subsection (4) shall be heard and determined by the court presided over by a provincial judge.

### Arrest for immediate adjudication

(6) Where the justice of the peace proceeds to deal with a contempt immediately and without adjournment under subsection (4), the justice of the peace may order the offender arrested and detained in the courtroom for the purpose of the hearing and determination.

### Barring agent in contempt

(7) Where the offender is appearing before the court as an agent who is not a barrister and solicitor entitled to practise in Ontario, the court may order that he or she be barred from acting as agent in the proceeding in addition to any other punishment to which he or she is liable.

### Appeals

(8) An order of punishment for contempt under this section is appealable in the same manner as if it were a conviction in a proceeding commenced by certificate under Part I of this Act.

### Enforcement

(9) This Act applies for the purpose of enforcing a punishment by way of a fine or imprisonment under this section. R.S.O. 1990, c. P.33, s. 91.

## Regulations

92. The Lieutenant Governor in Council may make regulations,

- (a) prescribing any matter referred to in this Act as prescribed by the regulations;
- (b) prescribing the form of certificate as to ownership of a motor vehicle given by the Registrar under subsection 210 (7) of the *Highway Traffic Act* for the purpose of proceedings under this Act;
- (c) providing for the extension of times prescribed by or under this Act or the rules of court in the event of a disruption in postal services;
- (d) requiring the payment of fees upon the filing of anything required or permitted to be filed under this Act or the rules and fixing the amounts thereof, and providing for the waiver of the payment of a fee by a justice, or by a judge under Part VII, in such circumstances and under such conditions as are set out in the regulations;
- (e) fixing costs payable upon conviction and referred to in subsection 60 (1);
- (f) fixing the items in respect of which costs may be awarded under subsection 60 (2) and prescribing the maximum amounts that may be awarded in respect of each item;
- (g) prescribing administrative fees for the purposes of subsection 70 (1) for the late payment of fines or classes of fines, and prescribing the classes. R.S.O. 1990, c. P.33, s. 92.

**PART VI  
YOUNG PERSONS**

Definitions

93. In this Part,

"parent", when used with reference to a young person, includes an adult with whom the young person ordinarily resides; ("père ou mère")

"young person" means a person who is or, in the absence of evidence to the contrary, appears to be,

(a) twelve years of age or more, but

(b) under sixteen years of age,

and includes a person sixteen years of age or more charged with having committed an offence while he or she was twelve years of age or more but under sixteen years of age. ("adolescent") R.S.O. 1990, c. P.33, s. 93.

Minimum age

94. No person shall be convicted of an offence committed while he or she was under twelve years of age. R.S.O. 1990, c. P.33, s. 94.

Offence notice not to be used

95. A proceeding commenced against a young person by certificate of offence shall not be initiated by an offence notice under clause 3 (2) (a). R.S.O. 1990, c. P.33, s. 95.

Notice to parent

96.--(1) Where a summons is served upon a young person or a young person is released on a recognizance under this Act, the provincial offences officer, in the case of a summons, or the officer in charge, in the case of a



recognizance, shall as soon as practicable give notice to a parent of the young person by delivering a copy of the summons or recognizance to the parent.

#### Where no notice given

(2) Where notice has not been given under subsection (1) and no person to whom notice could have been given appears with the young person, the court may,

- (a) adjourn the hearing to another time to permit notice to be given; or
- (b) dispense with notice.

#### Saving

(3) Failure to give notice to a parent under subsection (1) does not in itself invalidate the proceeding against the young person. R.S.O. 1990, c. P.33, s. 96.

#### Sentence where proceeding commenced by certificate

**97.--**(1) Despite subsection 12 (1), where a young person is found guilty of an offence in a proceeding commenced by certificate, the court may,

- (a) convict the young person and,
  - (i) order the young person to pay a fine not exceeding the set fine that would be payable for the offence by an adult, the maximum fine prescribed for the offence, or \$300, whichever is the least, or
  - (ii) suspend the passing of sentence and direct that the young person comply with the conditions prescribed in a probation order; or

- (b) discharge the young person absolutely.

#### Term of probation order

(2) Section 72 applies with necessary modifications to a probation order made under subclause (1) (a) (ii), in the same manner as if the proceeding were commenced by information, except that the probation order shall not remain in force for more than ninety days from the date when it takes effect.

#### s. 12 (2) applies where proceeding initiated by summons

(3) Subsection 12 (2) applies with necessary modifications where a young person is convicted of an offence in a proceeding initiated by summons, in the same manner as if the proceeding were initiated by offence notice. R.S.O. 1990, c. P.33, s. 97.

#### Young person to be present at trial

**98.--**(1) Subject to subsection 52 (1) and subsection (2) of this section, a young person shall be present in court during the whole of his or her trial.

#### Court may permit absence

(2) The court may permit a young person to be absent during the whole or any part of his or her trial, on such conditions as the court considers proper.

#### Application of ss. 42, 54

(3) Sections 42 and 54 do not apply to a young person who is a defendant.

#### Failure of young person to appear

(4) Where a young person who is a defendant does not appear at the time and place appointed for a hearing and it is proved by the prosecutor, having been given a reasonable opportunity to do so, that a summons was served, an undertaking to appear was given or a recognizance to appear was entered into, as the case may be, or where the young person does not appear upon

the resumption of a hearing that has been adjourned, the court may adjourn the hearing and issue a summons to appear or issue a warrant in the prescribed form for the arrest of the young person.

#### Compelling young person's attendance

(5) Where a young person does not attend personally in response to a summons issued under section 51 and it is proved by the prosecutor, having been given a reasonable opportunity to do so, that the summons was served, the court may adjourn the hearing and issue a further summons or issue a warrant in the prescribed form for the arrest of the young person. R.S.O. 1990, c. P.33, s. 98.

#### Identity of young person not to be published

**99.--(1)** No person shall publish by any means a report,

- (a) of an offence committed or alleged to have been committed by a young person; or
- (b) of a hearing, adjudication, sentence or appeal concerning a young person who committed or is alleged to have committed an offence,

in which the name of or any information serving to identify the young person is disclosed.

#### Offence

(2) Every person who contravenes subsection (1) and every director, officer or employee of a corporation who authorizes, permits or acquiesces in a contravention of subsection (1) by the corporation is guilty of an offence and is liable on conviction to a fine of not more than \$10,000.

## Exceptions

(3) Subsection (1) does not prohibit the following:

1. The disclosure of information by the young person concerned.
2. The disclosure of information by the young person's parent or lawyer, for the purpose of protecting the young person's interests.
3. The disclosure of information by a police officer, for the purpose of investigating an offence which the young person is suspected of having committed.
4. The disclosure of information to an insurer, to enable the insurer to investigate a claim arising out of an offence committed or alleged to have been committed by the young person.
5. The disclosure of information in the course of the administration of justice, but not for the purpose of making the information known in the community.
6. The disclosure of information by a person or member of a class of persons prescribed by the regulations, for a purpose prescribed by the regulations. R.S.O. 1990, c. P.33, s. 99.

## Pre-sentence report

**100.--**(1) Section 56 applies with necessary modifications where a young person is convicted of an offence in a proceeding commenced by certificate of offence, in the same manner as if the proceeding were commenced by information.

## Pre-sentence report mandatory where imprisonment considered

(2) Where a young person who is bound by a probation order is convicted of an offence under section 75 and the court is considering imposing a sentence of imprisonment, the court shall direct a probation officer to prepare and file with the court a report in writing relating to the defendant for the purpose of assisting the court in imposing sentence, and the clerk of the court shall cause a copy of the report to be provided to the defendant or his or her counsel or agent and to the prosecutor. R.S.O. 1990, c. P.33, s. 100.

## Penalties limited

**101.--**(1) Despite the provisions of this or any other Act, no young person shall be sentenced,

- (a) to be imprisoned, except under clause 75 (d); or
- (b) to pay a fine exceeding \$1,000.

## Sentence where proceeding commenced by information

(2) Where a young person is found guilty of an offence in a proceeding commenced by information, the court may,

- (a) convict the young person and,
  - (i) order the young person to pay a fine not exceeding the maximum prescribed for the offence or \$1,000, whichever is less, or
  - (ii) suspend the passing of sentence and direct that the young person comply with the conditions prescribed in a probation order; or
- (b) discharge the young person absolutely.



## Term of probation order

(3) A probation order made under subclause (2) (a) (ii) shall not remain in force for more than one year from the date when it takes effect. R.S.O. 1990, c. P.33, s. 101.

## No imprisonment for non-payment of fine

**102.--**(1) No warrant of committal shall be issued against a young person under section 69.

## Probation order in lieu of imprisonment

(2) Where it would be appropriate, but for subsection (1), to issue a warrant against a young person under subsection 69 (3) or (4), a judge may direct that the young person comply with the conditions prescribed in a probation order, where the young person has been given fifteen days notice of the intent to make a probation order and has had an opportunity to be heard.

## Term of probation order

(3) A probation order made under subsection (2) shall not remain in force for more than ninety days from the date when it takes effect. R.S.O. 1990, c. P.33, s. 102.

## Open custody

**103.** Where a young person is sentenced to a term of imprisonment for breach of probation under clause 75 (d), the term of imprisonment shall be served in a place of open custody designated under section 24.1 of the *Young Offenders Act* (Canada). R.S.O. 1990, c. P.33, s. 103.

## Evidence of young person's age

**104.** In a proceeding under this Act, a parent's testimony as to a young person's age and any other evidence of a young person's age that the court considers credible or trustworthy in the circumstances are admissible. R.S.O. 1990, c. P.33, s. 104.

## Appeal

**105.** Where the defendant is a young person, an appeal under subsection 135 (1) shall be to the Ontario Court (General Division), but the procedures and the powers of the court and any appeal from the judgment of the court shall be the same as if the appeal were to the Ontario Court (Provincial Division) presided over by a provincial judge. R.S.O. 1990, c. P.33, s. 105.

## Arrest without warrant limited

**106.** No person shall exercise an authority under this or any other Act to arrest a young person without warrant unless the person has reasonable and probable grounds to believe that it is necessary in the public interest to do so in order to,

- (a) establish the young person's identity; or
- (b) prevent the continuation or repetition of an offence that constitutes a serious danger to the young person or to the person or property of another. R.S.O. 1990, c. P.33, s. 106.

s. 149 does not apply

**107.--(1)** Section 149 does not apply to a young person who has been arrested.

## Release after arrest by officer

(2) Where a police officer acting under a warrant or other power of arrest arrests a young person, the police officer shall, as soon as is practicable, release the young person from custody unconditionally or after serving him or her with a summons unless the officer has reasonable and probable grounds to believe that it is necessary in the public interest for the young person to be detained in order to,

- (a) establish the young person's identity; or

- (b) prevent the continuation or repetition of an offence that constitutes a serious danger to the young person or the person or property of another.

#### Release by officer in charge

(3) Where a young person is not released from custody under subsection (2), the police officer shall deliver the young person to the officer in charge who shall, where in his or her opinion the conditions set out in clause (2) (a) or (b) do not or no longer exist, release the young person,

- (a) unconditionally;
- (b) upon serving the young person with a summons; or
- (c) upon the young person entering into a recognizance in the prescribed form without sureties conditioned for his or her appearance in court.

#### Notice to parent

(4) Where the officer in charge does not release the young person under subsection (3), the officer in charge shall as soon as possible notify a parent of the young person by advising the parent, orally or in writing, of the young person's arrest, the reason for the arrest and the place of detention.

#### ss. 150, 151 apply

(5) Sections 150 and 151 apply with necessary modifications to the release of a young person from custody under this section.

#### Place of custody

(6) No young person who is detained under section 150 shall be detained in any part of a place in which an adult who has been charged with or convicted of an offence is detained unless a justice so authorizes, on being satisfied that,

- (a) the young person cannot, having regard to the young person's own safety or the safety of others, be detained in a place of temporary detention for young persons; or
- (b) no place of temporary detention for young persons is available within a reasonable distance.

Idem

(7) Wherever practicable, a young person who is detained in custody shall be detained in a place of temporary detention designated under subsection 7 (1) of the *Young Offenders Act* (Canada). R.S.O. 1990, c. P.33, s. 107.

Functions of justice of peace limited

**108.** The functions of a justice with respect to a defendant who is a young person shall be performed only by a judge, except under Parts III and VIII. R.S.O. 1990, c. P.33, s. 108.

## PART VII APPEALS AND REVIEW

Definitions

**109.** In this Part,

"counsel" when used in respect of a proceeding in the Ontario Court (Provincial Division) includes an agent; ("avocat")

"court" means the court to which an appeal is or may be taken under this Part; ("tribunal")

"judge" means a judge of the court to which an appeal is or may be taken under this Part; ("juge d'appel")

"sentence" includes any order or disposition consequent upon a conviction and an order as to costs. ("sentence") R.S.O. 1990, c. P.33, s. 109.

## Custody pending appeal

**110.** A defendant who appeals shall, if in custody, remain in custody, but a judge may order his or her release upon any of the conditions set out in subsection 150 (2). R.S.O. 1990, c. P.33, s. 110.

## Payment of fine before appeal

**111.--(1)** A notice of appeal by a defendant shall not be accepted for filing if the defendant has not paid in full the fine imposed by the decision appealed from.

## Exception with recognizance

(2) A judge may waive compliance with subsection (1) and order that the appellant enter into a recognizance to appear on the appeal, and the recognizance shall be in such amount, with or without sureties, as the judge directs. R.S.O. 1990, c. P.33, s. 111.

## Stay

**112.** The filing of a notice of appeal does not stay the conviction unless a judge so orders. R.S.O. 1990, c. P.33, s. 112.

## Fixing of date where appellant in custody

**113.--(1)** Where an appellant is in custody pending the hearing of the appeal and the hearing of the appeal has not commenced within thirty days from the day on which notice of the appeal was given, the person having custody of the appellant shall make a motion to a judge to fix a date for the hearing of the appeal.

## Idem

(2) Upon receiving a motion under subsection (1), the judge shall, after giving the prosecutor a reasonable opportunity to be heard, fix a date for the



hearing of the appeal and give such directions as the judge thinks appropriate for expediting the hearing of the appeal. R.S.O. 1990, c. P.33, s. 113.

#### Payment of fine not waiver

**114.** A person does not waive the right of appeal by reason only that the person pays the fine or complies with any order imposed upon conviction. R.S.O. 1990, c. P.33, s. 114.

#### Transmittal of material

**115.** Where a notice of appeal has been filed, the clerk or local register of the appeal court shall notify the clerk of the trial court of the appeal and, upon receipt of the notification, the clerk of the trial court shall transmit the order appealed from and transmit or transfer custody of all other material in his or her possession or control relevant to the proceeding to the clerk or local registrar of the appeal court to be kept with the records of the appeal court. R.S.O. 1990, c. P.33, s. 115.

### APPEALS UNDER PART III

#### Appeal

**116.--(1)** Where a proceeding is commenced by information under Part III, the defendant or the prosecutor or the Attorney General by way of intervention may appeal from a conviction or dismissal or from a finding as to ability, because of mental disorder, to conduct a defence or as to sentence.

#### Appeal court

(2) An appeal under subsection (1) shall be,

- (a) where the appeal is from the decision of a justice of the peace, to the Ontario Court (Provincial Division) presided over by a provincial judge; or

- (b) where the appeal is from the decision of a provincial judge, to the Ontario Court (General Division).

#### Notice of appeal

(3) The appellant shall give notice of appeal in such manner and within such period as is provided by the rules of court. R.S.O. 1990, c. P.33, s. 116.

#### Powers of court

**117.--**(1) The court may, where it considers it to be in the interests of justice,

- (a) order the production of any writing, exhibit or other thing relevant to the appeal;
- (b) order any witness who would have been a compellable witness at the trial, whether or not he or she was called at the trial,
  - (i) to attend and be examined before the court, or
  - (ii) to be examined in the manner provided by the rules of court before a judge of the court, or before any officer of the court or justice of the peace or other person appointed by the court for the purpose;
- (c) admit, as evidence, an examination that is taken under subclause (b) (ii);
- (d) receive the evidence, if tendered, of any witness;
- (e) order that any question arising on the appeal that,
  - (i) involves prolonged examination of writings or accounts, or scientific investigation, and

- (ii) cannot in the opinion of the court conveniently be inquired into before the court,

be referred for inquiry and report, in the manner provided by the rules of court, to a special commissioner appointed by the court; and

- (f) act upon the report of a commissioner who is appointed under clause (e) in so far as the court thinks fit to do so.

#### Rights of parties

(2) Where the court exercises a power under this section, the parties or their counsel are entitled to examine or cross-examine witnesses and, in an inquiry under clause (1) (e), are entitled to be present during the inquiry and to adduce evidence and to be heard. R.S.O. 1990, c. P.33, s. 117.

#### Right to counsel

**118.--**(1) An appellant or respondent may appear and act personally or by counsel.

#### Attendance while in custody

(2) An appellant or respondent who is in custody as a result of the decision appealed from is entitled to be present at the hearing of the appeal.

#### Sentencing in absence

(3) The power of a court to impose sentence may be exercised although the appellant or respondent is not present. R.S.O. 1990, c. P.33, s. 118.

#### Written argument

**119.** An appellant or respondent may present the case on appeal and argument in writing instead of orally, and the court shall consider any case or argument so presented. R.S.O. 1990, c. P.33, s. 119.

## Powers on appeal against conviction

120.--(1) On the hearing of an appeal against a conviction or against a finding as to the ability, because of mental disorder, to conduct a defence, the court by order,

- (a) may allow the appeal where it is of the opinion that,
  - (i) the finding should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
  - (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
  - (iii) on any ground, there was a miscarriage of justice; or
- (b) may dismiss the appeal where,
  - (i) the court is of the opinion that the appellant, although the appellant was not properly convicted on a count or part of an information, was properly convicted on another count or part of the information,
  - (ii) the appeal is not decided in favour of the appellant on any ground mentioned in clause (a), or
  - (iii) although the court is of the opinion that on any ground mentioned in subclause (a) (ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred.

Idem

(2) Where the court allows an appeal under clause (1) (a), it shall,

- (a) where the appeal is from a conviction,
  - (i) direct a finding of acquittal to be entered, or
  - (ii) order a new trial; or
- (b) where the appeal is from a finding as to the ability, because of mental disorder, to conduct a defence, order a new trial, subject to section 44.

Idem

(3) Where the court dismisses an appeal under clause (1) (b), it may substitute the decision that in its opinion should have been made and affirm the sentence passed by the trial court or impose a sentence that is warranted in law. R.S.O. 1990, c. P.33, s. 120.

Powers on appeal against acquittal

**121.** Where an appeal is from an acquittal, the court may by order,

- (a) dismiss the appeal; or
- (b) allow the appeal, set aside the finding and,
  - (i) order a new trial, or
  - (ii) enter a finding of guilt with respect to the offence of which, in its opinion, the person who has been accused of the offence should have been found guilty, and pass a sentence that is warranted in law. R.S.O. 1990, c. P.33, s. 121.



## Appeal against sentence

**122.--**(1) Where an appeal is taken against sentence, the court shall consider the fitness of the sentence appealed from and may, upon such evidence, if any, as it thinks fit to require or receive, by order,

- (a) dismiss the appeal; or
- (b) vary the sentence within the limits prescribed by law for the offence of which the defendant was convicted,

and, in making any order under clause (b), the court may take into account any time spent in custody by the defendant as a result of the offence.

## Variance of sentence

(2) A judgment of a court that varies a sentence has the same force and effect as if it were a sentence passed by the trial court. R.S.O. 1990, c. P.33, s. 122.

## One sentence on more than one count

**123.** Where one sentence is passed upon a finding of guilt on two or more counts, the sentence is good if any of the counts would have justified the sentence. R.S.O. 1990, c. P.33, s. 123.

## Appeal based on defect in information or process

**124.--**(1) Judgment shall not be given in favour of an appellant based on any alleged defect in the substance or form of an information, certificate or process or any variance between the information, certificate or process and the evidence adduced at trial unless it is shown that objection was taken at the trial and that, in the case of a variance, an adjournment of the trial was refused although the variance had misled the appellant.

**Idem**

(2) Where an appeal is based on a defect in a conviction or an order, judgment shall not be given in favour of the appellant, but the court shall make an order curing the defect. R.S.O. 1990, c. P.33, s. 124.

**Additional orders**

**125.** Where a court exercises any of the powers conferred by sections 117 to 124, it may make any order, in addition, that justice requires. R.S.O. 1990, c. P.33, s. 125.

**New trial**

**126.--**(1) Where a court orders a new trial, it shall be held in the Ontario Court (Provincial Division) presided over by a justice other than the justice who tried the defendant in the first instance unless the appeal court directs that the new trial be held before the justice who tried the defendant in the first instance.

**Order for release**

(2) Where a court orders a new trial, it may make such order for the release or detention of the appellant pending such trial as may be made by a justice under subsection 150 (2) and the order may be enforced in the same manner as if it had been made by a justice under that subsection. R.S.O. 1990, c. P.33, s. 126.

**Appeal by way of new trial**

**127.--**(1) Where, because of the condition of the record of the trial in the trial court or for any other reason, the court, upon the motion of the appellant or respondent, is of the opinion that the interests of justice would be better served by hearing and determining the appeal by holding a new trial in the court, the court may order that the appeal shall be heard by way of a new trial in the court and for this purpose this Act applies with necessary modifications in the same manner as to a proceeding in the trial court.

## Evidence

(2) The court may, for the purpose of hearing and determining an appeal under subsection (1), permit the evidence of any witness taken before the trial court to be read if that evidence has been authenticated and if,

- (a) the appellant and respondent consent;
- (b) the court is satisfied that the attendance of the witness cannot reasonably be obtained; or
- (c) by reason of the formal nature of the evidence or otherwise the court is satisfied that the opposite party will not be prejudiced,

and any evidence that is read under the authority of this subsection has the same force and effect as if the witness had given the evidence before the court. R.S.O. 1990, c. P.33, s. 127.

## Dismissal or abandonment

**128.** The court may, upon proof that notice of an appeal has been given and that,

- (a) the appellant has failed to comply with any order made under section 110 or 111 or with the conditions of any recognizance entered into under either of those sections; or
- (b) the appeal has not been proceeded with or has been abandoned,

order that the appeal be dismissed. R.S.O. 1990, c. P.33, s. 128.

## Costs

**129.--**(1) Where an appeal is heard and determined or is abandoned or is dismissed for want of prosecution, the court may make any order with respect to costs that it considers just and reasonable.

## Payment

(2) Where the court orders the appellant or respondent to pay costs, the order shall direct that the costs be paid to the clerk of the trial court, to be paid by the clerk to the person entitled to them, and shall fix the period within which the costs shall be paid.

## Enforcement

(3) Costs ordered to be paid under this section by a person other than a prosecutor acting on behalf of the Crown shall be deemed to be a fine for the purpose of enforcing its payment. R.S.O. 1990, c. P.33, s. 129.

## Implementation of appeal court order

**130.** An order or judgment of the appeal court shall be implemented or enforced by the trial court and the clerk or local registrar of the appeal court shall send to the clerk of the trial court the order and all writings relating thereto. R.S.O. 1990, c. P.33, s. 130.

## Appeal to Court of Appeal

**131.--**(1) A defendant or the prosecutor or the Attorney General by way of intervention may appeal from the judgment of the court to the Court of Appeal, with leave of a judge of the Court of Appeal on special grounds, upon any question of law alone or as to sentence.

## Grounds for leave

(2) No leave to appeal shall be granted under subsection (1) unless the judge of the Court of Appeal considers that in the particular circumstances of

the case it is essential in the public interest or for the due administration of justice that leave be granted.

#### Appeal as to leave

(3) No appeal or review lies from a decision on a motion for leave to appeal under subsection (1). R.S.O. 1990, c. P.33, s. 131.

#### Custody pending appeal

**132.** A defendant who appeals shall, if the defendant is in custody, remain in custody, but a judge may order his or her release upon any of the conditions set out in subsection 150 (2). R.S.O. 1990, c. P.33, s. 132.

#### Transfer of record

**133.** Where a motion for leave to appeal is made, the Registrar of the Court of Appeal shall notify the clerk or local registrar of the court appealed from of the motion and, upon receipt of the notification, the clerk or local registrar of the court shall transmit to the Registrar all the material forming the record including any other relevant material requested by a judge of the Court of Appeal. R.S.O. 1990, c. P.33, s. 133.

#### Application of ss. 114, 117-126, 128 (b), 129

**134.** Sections 114, 117, 118, 119, 120, 121, 122, 123, 124, 125 and 126, clause 128 (b) and section 129 apply with necessary modifications to appeals to the Court of Appeal under section 131. R.S.O. 1990, c. P.33, s. 134.



## APPEALS UNDER PARTS I AND II

## Appeal

**135.--**(1) A defendant or the prosecutor or the Attorney General by way of intervention is entitled to appeal an acquittal, conviction or sentence in a proceeding commenced by certificate under Part I or II and the appeal shall be to the Ontario Court (Provincial Division) presided over by a provincial judge.

## Application for appeal

(2) A notice of appeal shall be in the prescribed form and shall state the reasons why the appeal is taken and shall be filed with the clerk of the court within fifteen days after the making of the decision appealed from, in accordance with the rules of court.

## Notice of hearing

(3) The clerk shall, as soon as is practicable, give a notice to the defendant and prosecutor of the time and place of the hearing of the appeal. R.S.O. 1990, c. P.33, s. 135.

## Conduct of appeal

**136.--**(1) Upon an appeal, the court shall give the parties an opportunity to be heard for the purpose of determining the issues and may, where the circumstances warrant it, make such inquiries as are necessary to ensure that the issues are fully and effectively defined.

## Review

(2) An appeal shall be conducted by means of a review.

## Evidence

(3) In determining a review, the court may,

- (a) hear or rehear the recorded evidence or any part thereof and may require any party to provide a transcript of the evidence, or any part thereof, or to produce any further exhibit;
- (b) receive the evidence of any witness whether or not the witness gave evidence at the trial;
- (c) require the justice presiding at the trial to report in writing on any matter specified in the request; or
- (d) receive and act upon statements of agreed facts or admissions. R.S.O. 1990, c. P.33, s. 136.

## Dismissal on abandonment

**137.** Where an appeal has not been proceeded with or abandoned, the court may order that the appeal be dismissed. R.S.O. 1990, c. P.33, s. 137.

## Powers of court on appeal

**138.--(1)** Upon an appeal, the court may affirm, reverse or vary the decision appealed from or where, in the opinion of the court, it is necessary to do so to satisfy the ends of justice, direct a new trial.

## New trial

(2) Where the court directs a new trial, it shall be held in the Ontario Court (Provincial Division) presided over by a justice other than the justice who tried the defendant in the first instance, but the appeal court may, with the consent of the parties to the appeal, direct that the new trial be held before the justice who tried the defendant in the first instance or before the judge who directs the new trial.

### Costs

(3) Upon an appeal, the court may make an order under section 60 for the payment of costs incurred on the appeal, and subsection (3) thereof applies to the order. R.S.O. 1990, c. P.33, s. 138.

### Appeal to Court of Appeal

**139.--**(1) An appeal lies from the judgment of the Ontario Court (Provincial Division) in an appeal under section 135 to the Court of Appeal, with leave of a judge of the Court of Appeal, on special grounds, upon any question of law alone.

### Grounds for leave

(2) No leave to appeal shall be granted under subsection (1) unless the judge of the Court of Appeal considers that in the particular circumstances of the case it is essential in the public interest or for the due administration of justice that leave be granted.

### Costs

(3) Upon an appeal under this section, the Court of Appeal may make any order with respect to costs that it considers just and reasonable.

### Appeal as to leave

(4) No appeal or review lies from a decision on a motion for leave to appeal under subsection (1). R.S.O. 1990, c. P.33, s. 139.

## REVIEW

Application for relief in nature of mandamus, prohibition, certiorari

**140.--**(1) On application, the Ontario Court (General Division) may by order grant any relief in respect of matters arising under this Act that the applicant would be entitled to in an application for an order in the nature of mandamus, prohibition or certiorari.

Notice of application

(2) Notice of an application under this section shall be served on,

- (a) the person whose act or omission gives rise to the application;
- (b) any person who is a party to a proceeding that gives rise to the application; and
- (c) the Attorney General.

Appeal

(3) An appeal lies to the Court of Appeal from an order made under this section. R.S.O. 1990, c. P.33, s. 140.

Notice re certiorari

**141.--**(1) A notice under section 140 in respect of an application for relief in the nature of certiorari shall be given at least seven days and not more than ten days before the date fixed for the hearing of the application and the notice shall be served within thirty days after the occurrence of the act sought to be quashed.

Filing material

(2) Where a notice referred to in subsection (1) is served on the person making the decision, order or warrant or holding the proceeding giving rise to

the application, such person shall forthwith file with the Ontario Court (General Division) for use on the application, all material concerning the subject-matter of the application.

#### Where appeal available

(3) No application shall be made to quash a conviction, order or ruling from which an appeal is provided by this Act, whether subject to leave or otherwise.

#### Substantial wrong

(4) On an application for relief in the nature of certiorari, the Ontario Court (General Division) shall not grant relief unless the court finds that a substantial wrong or miscarriage of justice has occurred, and the court may amend or validate any decision already made, with effect from such time and on such terms as the court considers proper.

#### Order for immunity from civil liability

(5) Where an application is made to quash a decision, order, warrant or proceeding made or held by a justice on the ground that the justice exceeded his or her jurisdiction, the Ontario Court (General Division) may, in quashing the decision, order, warrant or proceeding, order that no civil proceeding shall be taken against the justice or against any officer who acted under the decision, order or warrant or in the proceeding or under any warrant issued to enforce it. R.S.O. 1990, c. P.33, s. 141.

#### Application for *habeas corpus*

**142.--**(1) On application, the Ontario Court (General Division) may by order grant any relief in respect of a matter arising under this Act that the applicant would be entitled to in an application for an order in the nature of *habeas corpus*.



Procedure on application for relief in nature of *habeas corpus*

(2) Notice of an application under subsection (1) for relief in the nature of *habeas corpus* shall be served upon the person having custody of the person in respect of whom the application is made and upon the Attorney General and upon the hearing of the application the presence before the court of the person in respect of whom the application was made may be dispensed with by consent, in which event the court may proceed to dispose of the matter forthwith as the justice of the case requires.

Idem

(3) Subject to subsections (1) and (2), the *Habeas Corpus Act* applies to applications under this section, but an application for relief in the nature of certiorari may be brought in aid of an application under this section.

Idem

(4) The *Judicial Review Procedure Act* does not apply to matters in respect of which an application may be made under section 140.

Costs

(5) A court to which an application or appeal is made under section 140 or this section may make any order with respect to costs that it considers just and reasonable. R.S.O. 1990, c. P.33, s. 142.

**PART VIII**  
**ARREST, BAIL AND SEARCH**  
**WARRANTS**

**ARREST**

Officer in charge

**143.** In this Part, "officer in charge" means the police officer who is in charge of the lock-up or other place to which a person is taken after his or her arrest. R.S.O. 1990, c. P.33, s. 143.

Execution of warrant

**144.--(1)** A warrant for the arrest of a person shall be executed by a police officer by arresting the person against whom the warrant is directed wherever he or she is found in Ontario.

Idem

**(2)** A police officer may arrest without warrant a person for whose arrest he or she has reasonable and probable grounds to believe that a warrant is in force in Ontario. R.S.O. 1990, c. P.33, s. 144.

Arrest without warrant

**145.** Any person may arrest without warrant a person who he or she has reasonable and probable grounds to believe has committed an offence and is escaping from and freshly pursued by a police officer who has lawful authority to arrest that person, and, where the person who makes the arrest is not a police officer, shall forthwith deliver the person arrested to a police officer. R.S.O. 1990, c. P.33, s. 145.

## Use of force

**146.--**(1) Every police officer is, if he or she acts on reasonable and probable grounds, justified in using as much force as is necessary to do what the officer is required or authorized by law to do.

## Use of force by citizen

(2) Every person upon whom a police officer calls for assistance is justified in using as much force as he or she believes on reasonable and probable grounds is necessary to render such assistance. R.S.O. 1990, c. P.33, s. 146.

## Immunity from civil liability

**147.** Where a person is wrongfully arrested, whether with or without a warrant, no action for damages shall be brought,

- (a) against the police officer making the arrest if he or she believed in good faith and on reasonable and probable grounds that the person arrested was the person named in the warrant or was subject to arrest without warrant under the authority of an Act;
- (b) against any person called upon to assist the police officer if such person believed that the police officer had the right to effect the arrest; or
- (c) against any person required to detain the prisoner in custody if such person believed the arrest was lawfully made. R.S.O. 1990, c. P.33, s. 147.

## Production of process

**148.--**(1) It is the duty of every one who executes a process or warrant to have it with him or her, where it is feasible to do so, and to produce it when requested to do so.

## Notice of reason for arrest

(2) It is the duty of every one who arrests a person, whether with or without warrant, to give notice to that person, where it is feasible to do so, of the reason for the arrest. R.S.O. 1990, c. P.33, s. 148.

## BAIL

## Release after arrest by officer

**149.--**(1) Where a police officer, acting under a warrant or other power of arrest, arrests a person, the police officer shall, as soon as is practicable, release the person from custody after serving him or her with a summons or offence notice unless the officer has reasonable and probable grounds to believe that,

- (a) it is necessary in the public interest for the person to be detained, having regard to all the circumstances including the need to,
  - (i) establish the identity of the person,
  - (ii) secure or preserve evidence of or relating to the offence, or
  - (iii) prevent the continuation or repetition of the offence or the commission of another offence; or
- (b) the person arrested is ordinarily resident outside Ontario and will not respond to a summons or offence notice.

## Release by officer in charge

(2) Where a defendant is not released from custody under subsection (1), the police officer shall deliver him or her to the officer in charge who shall, where in his or her opinion the conditions set out in clauses (1) (a) and (b) do not or no longer exist, release the defendant,

- (a) upon serving the defendant with a summons or offence notice;
- (b) upon the defendant entering into a recognizance in the prescribed form without sureties conditioned for his or her appearance in court.

#### Cash bail by non-resident

(3) Where the defendant is held for the reason only that he or she is not ordinarily resident in Ontario and it is believed that the defendant will not respond to a summons or offence notice, the officer in charge may, in addition to anything required under subsection (2), require the defendant to deposit cash or other satisfactory negotiable security in an amount not to exceed,

- (a) where the proceeding is commenced by certificate under Part I or II, the amount of the set fine for the offence or, if none, \$300; or
- (b) where the proceeding is commenced by information under Part III, \$500. R.S.O. 1990, c. P.33, s. 149.

#### Person in custody to be brought before justice

**150.--**(1) Where a defendant is not released from custody under section 149, the officer in charge shall, as soon as is practicable but in any event within twenty-four hours, bring the defendant before a justice and the justice shall, unless a plea of guilty is taken, order that the defendant be released upon giving his or her undertaking to appear unless the prosecutor having been given an opportunity to do so shows cause why the detention of the defendant is justified to ensure his or her appearance in court or why an order under subsection (2) is justified for the same purpose.

#### Order for conditional release

(2) Subject to subsection (1), the justice may order the release of the defendant,



- (a) upon the defendant entering into a recognizance to appear with such conditions as are appropriate to ensure his or her appearance in court;
- (b) where the offence is one punishable by imprisonment for twelve months or more, conditional upon the defendant entering into a recognizance before a justice with sureties in such amount and with such conditions, if any, as are appropriate to ensure his or her appearance in court or, with the consent of the prosecutor, upon the defendant depositing with the justice such sum of money or other valuable security as the order directs in an amount not exceeding,
  - (i) where the proceeding is commenced by certificate under Part I or II, the amount of the set fine for the offence or, if none, \$300, or
  - (ii) where the proceeding is commenced by information under Part III, \$1,000; or
- (c) if the defendant is not ordinarily resident in Ontario, upon the defendant entering into a recognizance before a justice, with or without sureties, in such amount and with such conditions, if any, as are appropriate to ensure his or her appearance in court, and depositing with the justice such sum of money or other valuable security as the order directs in an amount not exceeding,
  - (i) where the proceeding is commenced by certificate under Part I or II, the amount of the set fine for the offence or, if none, \$300, or
  - (ii) where the proceeding is commenced by information under Part III, \$1,000.

## Idem

(3) The justice shall not make an order under clause (2) (b) or (c) unless the prosecutor shows cause why an order under the immediately preceding clause should not be made.

## Order for detention

(4) Where the prosecutor shows cause why the detention of the defendant in custody is justified to ensure his or her appearance in court, the justice shall order the defendant to be detained in custody until he or she is dealt with according to law.

## Reasons

(5) The justice shall include in the record a statement of the reasons for his or her decision under subsection (1), (2) or (4).

## Evidence at hearing

(6) Where a person is brought before a justice under subsection (1), the justice may receive and base his or her decision upon information the justice considers credible or trustworthy in the circumstances of each case except that the defendant shall not be examined or cross-examined in respect of the offence with which he or she is charged.

## Adjournments

(7) Where a person is brought before a justice under subsection (1), the matter shall not be adjourned for more than three days without the consent of the defendant. R.S.O. 1990, c. P.33, s. 150.

## Expediting trial of person in custody

**151.--**(1) Where a defendant is not released from custody under section 149 or 150, he or she shall be brought before the court forthwith and, in any event, within eight days.

### Further orders

(2) The justice presiding upon any appearance of the defendant in court may, upon the motion of the defendant or prosecutor, review any order made under section 150 and make such further or other order under section 150 as to the justice seems appropriate in the circumstances. R.S.O. 1990, c. P.33, s. 151.

### Appeal

**152.** A defendant or the prosecutor may appeal from an order or refusal to make an order under section 150 or 151 and the appeal shall be to the Ontario Court (General Division). R.S.O. 1990, c. P.33, s. 152.

### Appointment of agent for appearance

**153.--(1)** A person who is released upon deposit under subsection 149 (3) or clause 150 (2) (c) may appoint the clerk of the court to act as the person's agent, in the event that he or she does not appear to answer to the charge, for the purpose of entering a plea of guilty on the person's behalf and authorizing the clerk to apply the amount so deposited toward payment of the fine and costs imposed by the court upon the conviction, and the clerk shall act as agent under this subsection without fee.

### Returns to court

(2) An officer in charge or justice who takes a recognizance, money or security under section 149 or 150 shall make a return thereof to the court.

### Returns to sureties

(3) The clerk of the court shall, upon the conclusion of a proceeding, make a financial return to every person who deposited money or security under a recognizance and return the surplus, if any. R.S.O. 1990, c. P.33, s. 153.

### Recognizance binds for all appearances

**154.--**(1) The recognizance of a person to appear in a proceeding binds the person and the person's sureties in respect of all appearances required in the proceeding at times and places to which the proceeding is adjourned.

### Recognizance binds independently of other charges

(2) A recognizance is binding in respect of appearances for the offence to which it relates and is not vacated upon the arrest, discharge or conviction of the defendant upon another charge.

### Liability of principal

(3) The principal to a recognizance is bound for the amount of the recognizance due upon forfeiture.

### Liability where sureties

(4) The principal and each surety to a recognizance are bound, jointly and severally, for the amount of the recognizance due upon forfeiture for non-appearance. R.S.O. 1990, c. P.33, s. 154.

### Motion by surety to be relieved

**155.--**(1) A surety to a recognizance may, on motion in writing to the court at the location where the defendant is required to appear, ask to be relieved of the surety's obligation under the recognizance and the court shall thereupon issue a warrant for the arrest of the defendant.

### Certificate of arrest

(2) When a police officer arrests the defendant under a warrant issued under subsection (1), he or she shall bring the defendant before a justice under section 150 and certify the arrest by certificate in the prescribed form and deliver the certificate to the court.

### Vacating of recognizance

(3) The receipt of the certificate by the court under subsection (2) vacates the recognizance and discharges the sureties. R.S.O. 1990, c. P.33, s. 155.

### Delivery of defendant by surety

**156.** A surety to a recognizance may discharge the surety's obligation under the recognizance by delivering the defendant into the custody of the court at the location where he or she is required to appear at any time while it is sitting at or before the trial of the defendant. R.S.O. 1990, c. P.33, s. 156.

### Certificate of default

**157.--**(1) Where a person who is bound by recognizance does not comply with a condition of the recognizance, a justice having knowledge of the facts shall endorse on the recognizance a certificate in the prescribed form setting out,

- (a) the nature of the default;
- (b) the reason for the default, if it is known;
- (c) whether the ends of justice have been defeated or delayed by reason of the default; and
- (d) the names and addresses of the principal and sureties.

### Certificate as evidence

(2) A certificate that has been endorsed on a recognizance under subsection (1) is evidence of the default to which it relates.

### Motion for forfeiture

(3) The clerk of the court shall transmit the endorsed recognizance to the local registrar of the Ontario Court (General Division) and, upon its receipt,



the endorsed recognizance constitutes a motion for the forfeiture of the recognizance.

#### Notice of hearing

(4) A judge of the Ontario Court (General Division) shall fix a time and place for the hearing of the motion by the court and the local registrar of the court shall, not less than ten days before the time fixed for the hearing, deliver notice to the prosecutor and to each principal and, where the motion is for forfeiture for non-appearance, each surety named in the recognizance, of the time and place fixed for the hearing and requiring each principal and surety to show cause why the recognizance should not be forfeited.

#### Order as to forfeiture

(5) The Ontario Court (General Division) may, after giving the parties an opportunity to be heard, in its discretion grant or refuse the motion and make any order in respect of the forfeiture of the recognizance that the court considers proper.

#### Collection on forfeiture

(6) Where an order for forfeiture is made under subsection (5),

- (a) any money or security forfeited shall be paid over by the person who has custody of it to the person who is entitled by law to receive it; and
- (b) the principal and surety become judgment debtors of the Crown jointly and severally in the amount forfeited under the recognizance and the amount may be collected in the same manner as money owing under a judgment of the Ontario Court (General Division). R.S.O. 1990, c. P.33, s. 157.

## SEARCH WARRANTS

## Search warrant

**158.--**(1) Where a justice is satisfied by information upon oath that there is reasonable ground to believe that there is in any building, receptacle or place,

- (a) anything upon or in respect of which an offence has been or is suspected to have been committed; or
- (b) anything that there is reasonable ground to believe will afford evidence as to the commission of an offence,

the justice may at any time issue a warrant in the prescribed form under his or her hand authorizing a police officer or person named therein to search such building, receptacle or place for any such thing, and to seize and carry it before the justice issuing the warrant or another justice to be dealt with by him or her according to law.

## Expiration

(2) Every search warrant shall name a date upon which it expires, which date shall be not later than fifteen days after its issue.

## When to be executed

(3) Every search warrant shall be executed between 6 a.m. and 9 p.m. standard time, unless the justice by the warrant otherwise authorizes. R.S.O. 1990, c. P.33, s. 158.

## Detention of things seized

**159.--**(1) Where any thing is seized and brought before a justice, he or she shall by order,

- (a) detain it or direct it to be detained in the care of a person named in the order; or

- (b) direct it to be returned,

and the justice may in the order authorize the examination, testing, inspection or reproduction of the thing seized upon such conditions as are reasonably necessary and directed in the order, and may make any other provision as in the opinion of the justice is necessary for its preservation.

#### Time limit for detention

(2) Nothing shall be detained under an order made under subsection (1) for a period of more than three months after the time of seizure unless, before the expiration of that period,

- (a) upon motion, a justice is satisfied that having regard to the nature of the investigation, its further detention for a specified period is warranted and he or she so orders; or
- (b) a proceeding is instituted in which the thing detained may be required.

#### Motion for examination and copying

(3) Upon the motion of the defendant, prosecutor or person having an interest in a thing detained under subsection (1), a justice may make an order for the examination, testing, inspection or reproduction of any thing detained upon such conditions as are reasonably necessary and directed in the order.

#### Motion for release

(4) Upon the motion of a person having an interest in a thing detained under subsection (1), and upon notice to the defendant, the person from whom the thing was seized, the person to whom the search warrant was issued and any other person who has an apparent interest in the thing detained, a justice may make an order for the release of any thing detained to the person from whom the thing was seized where it appears that the thing detained is no longer necessary for the purpose of an investigation or proceeding.

Appeal where order by justice of the peace

(5) Where an order or refusal to make an order under subsection (3) or (4) is made by a justice of the peace, an appeal lies therefrom in the same manner as an appeal from a conviction in a proceeding commenced by means of a certificate. R.S.O. 1990, c. P.33, s. 159.

Examination or seizure of documents where privilege claimed

**160.--**(1) Where under a search warrant a person is about to examine or seize a document that is in the possession of a lawyer and a solicitor-client privilege is claimed on behalf of a named client in respect of the document, the person shall, without examining or making copies of the document,

- (a) seize the document and place it, together with any other document seized in respect of which the same claim is made on behalf of the same client, in a package and seal and identify the package; and
- (b) place the package in the custody of the clerk of the court or, with the consent of the person and the client, in the custody of another person.

Opportunity to claim privilege

(2) No person shall examine or seize a document that is in the possession of a lawyer without giving him or her a reasonable opportunity to claim the privilege under subsection (1).

Examination of documents in custody

(3) A judge may, upon the motion made without notice of the lawyer, by order authorize the lawyer to examine or make a copy of the document in the presence of its custodian or the judge, and the order shall contain such provisions as are necessary to ensure that the document is repackaged and resealed without alteration or damage.

### Motion to determine privilege

(4) Where a document has been seized and placed in custody under subsection (1), the client by or on whose behalf the claim of solicitor-client privilege is made may make a motion to a judge for an order sustaining the privilege and for the return of the document.

### Limitation

(5) A motion under subsection (4) shall be by notice of motion naming a hearing date not later than thirty days after the date on which the document was placed in custody.

### Attorney General a party

(6) The person who seized the document and the Attorney General are parties to a motion under subsection (4) and entitled to at least three days notice thereof.

### Private hearing and scrutiny by judge

(7) A motion under subsection (4) shall be heard in private and, for the purposes of the hearing, the judge may examine the document and, if he or she does so, shall cause it to be resealed.

### Order

(8) The judge may by order,

- (a) declare that the solicitor-client privilege exists or does not exist in respect of the document;
- (b) direct that the document be delivered up to the appropriate person.



Release of document where no motion under subs. (4)

(9) Where it appears to a judge upon the motion of the Attorney General or person who seized the document that no motion has been made under subsection (4) within the time limit prescribed by subsection (5), the judge shall order that the document be delivered to the applicant. R.S.O. 1990, c. P.33, s. 160.

## PART IX ORDERS ON APPLICATION UNDER STATUTES

### Orders under statutes

**161.** Where, by any other Act, a proceeding is authorized to be taken before the Ontario Court (Provincial Division) or a justice for an order, including an order for the payment of money, and no other procedure is provided, this Act applies with necessary modifications to the proceeding in the same manner as to a proceeding commenced under Part III, and for the purpose,

- (a) in place of an information, the applicant shall complete a statement in the prescribed form under oath attesting, on reasonable and probable grounds, to the existence of facts that would justify the order sought; and
  - (b) in place of a plea, the defendant shall be asked whether or not the defendant wishes to dispute the making of the order. R.S.O. 1990, c. P.33, s. 161.
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## Regulations Act

### Definitions

1. In this Act,

"file" means file in the manner prescribed in section 2; ("déposer")

"Minister" means the member of the Executive Council to whom the administration of this Act is assigned by the Lieutenant Governor in Council; ("ministre")

"Registrar" means the Registrar of Regulations; ("registrateur")

"regulation" means a regulation, rule, order or by-law of a legislative nature made or approved under an Act of the Legislature by the Lieutenant Governor in Council, a minister of the Crown, an official of the government or a board or commission all the members of which are appointed by the Lieutenant Governor in Council, but does not include,

- (a) a by-law of a municipality or local board as defined in the *Municipal Affairs Act*,
- (b) a regulation made under *The Broker-Dealers Act, 1947*, the *Teaching Profession Act*, section 78 of the *Cemeteries Act* or by an authority under section 30 of the *Conservation Authorities Act*, or a by-law of a hospital made under the *Public Hospitals Act*, or the constitution and by-laws of an association made under the *Agricultural and Horticultural Organizations Act*,
- (c) an order of the Ontario Municipal Board, other than an order prescribing the rules governing proceedings before the Board,

- (d) an order, direction or designation of the Lieutenant Governor in Council under section 7, 29, 40, 41, 42, 44 or 65 of the *Public Transportation and Highway Improvement Act* or a designation by the Minister of Transportation under section 43 or 90 of that Act,
- (e) a schedule of classifications for civil servants, including qualifications, duties and salaries prescribed under the *Public Service Act*, or
- (f) an order, approval, regulation, prescription, direction or instruction of the Minister of Intergovernmental Affairs or the Ministry of Intergovernmental Affairs that the Minister or the Ministry is empowered to give or make under the *Municipal Act* or under the *Municipal Affairs Act*. ("règlement") R.S.O. 1980, c. 446, s. 1.

#### Filing required

2.--(1) Every regulation shall be filed in duplicate with the Registrar together with a certificate in duplicate of its making signed by the authority making it or a responsible officer thereof and, where approval is required, with a certificate of approval in duplicate signed by the authority so approving or by a responsible officer thereof, except that in the case of a regulation made by a minister that does not require approval, no certificate is required.

#### Copy from Executive Council

(2) Where a regulation is made or approved by the Lieutenant Governor in Council, the filing with the Registrar of two copies of it certified to be true copies by the Clerk of the Executive Council shall be deemed to be compliance with subsection (1). R.S.O. 1980, c. 446, s. 2.

#### Commencement

3. Unless otherwise stated in it, a regulation comes into force and has effect on and after the day upon which it is filed. R.S.O. 1980, c. 446, s. 3.

### Failure to file

4. Except where otherwise provided, a regulation that is not filed has no effect. R.S.O. 1980, c. 446, s. 4.

### Publication

5.--(1) Every regulation shall be published in *The Ontario Gazette* within one month of its filing.

### Extension of time for publication

(2) The Minister may at any time by order extend the time for publication of a regulation and the order shall be published with the regulation.

### Effect of non-publication

(3) A regulation that is not published is not effective against a person who has not had actual notice of it.

### Effect of publication

(4) Publication of a regulation,

- (a) is, in the absence of evidence to the contrary, proof of its text and of its making, its approval where required, and its filing; and
- (b) shall be deemed to be notice of its contents to every person subject to it or affected by it,

and judicial notice shall be taken of it, of its contents and of its publication. R.S.O. 1980, c. 446, s. 5.

### Powers of Minister

6. The Minister may,



- (a) determine whether a regulation, rule, order or by-law is a regulation within the meaning of this Act and his or her decision is final;
- (b) determine who shall be deemed responsible officers within the meaning of section 2; and
- (c) determine any matter that may arise in connection with the administration of this Act. R.S.O. 1980, c. 446, s. 6.

#### Registrar

7.--(1) There shall be a Registrar of Regulations appointed by the Lieutenant Governor in Council who,

- (a) is responsible for the numbering and indexing of all regulations filed in his or her office and for their publication; and
- (b) shall exercise such powers and perform such duties as are vested in or imposed upon him or her by this Act, the regulations made hereunder, or the Minister.

#### Certificate of Registrar

(2) The Registrar may issue a certificate as to the filing of a regulation and every such certificate is, in the absence of evidence to the contrary, proof of the facts stated in it without any proof of appointment or signature.

#### Filing of maps or plans

- (3) Where a map or plan,
  - (a) forms part of a regulation for the purpose of illustrating a description of land; and

- (b) is identified in the regulation by a number given to it by the Registrar,

and the regulation states that the map or plan is filed in the office of the Registrar, the Registrar may in his or her discretion file the map or plan in his or her office in numerical order and no publication of the map or plan is necessary. R.S.O. 1980, c. 446, s. 7.

### Numbering

8. Regulations shall be numbered in the order in which they are filed, and a new series shall be commenced each year. R.S.O. 1980, c. 446, s. 8.

### Citation

9. A regulation may be cited or referred to in English as "Ontario Regulation" or "O. Reg." and in French as "Règlement de l'Ontario" or "Règl. de l'Ont.", followed by its filing number, a virgule and the last two figures of the year of its filing. R.S.O. 1980, c. 446, s. 9, *revised*.

### Regulations

10.--(1) The Lieutenant Governor in Council may make regulations,

- (a) prescribing the powers and duties of the Registrar;
- (b) prescribing the form, arrangement and scheme of regulations;
- (c) prescribing a system of indexing;
- (d) providing for the preparation and publication of a consolidation or codification of regulations that have been filed, and for the preparation and publication of supplements thereto;
- (e) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act.

## Consolidation, codification

(2) Publication of a regulation in a consolidation or codification or supplement thereto mentioned in clause (1) (d) shall be deemed publication within the meaning of this Act. R.S.O. 1980, c. 446, s. 10.

## Defects not corrected

11. The filing or publication of a regulation under this Act does not have the effect of validating or correcting any such regulation that is otherwise invalid or defective in any respect or for any reason. R.S.O. 1980, c. 446, s. 11.

## Standing Committee on Regulations

12.--(1) At the commencement of each session of the Legislature a standing committee of the Assembly shall be appointed, to be known as the Standing Committee on Regulations, with authority to sit during the session.

## Regulations referred

(2) Every regulation stands permanently referred to the Standing Committee on Regulations for the purposes of subsection (3).

## Terms of reference

(3) The Standing Committee on Regulations shall examine the regulations with particular reference to the scope and method of the exercise of delegated legislative power but without reference to the merits of the policy or objectives to be effected by the regulations or enabling statutes, and shall deal with such other matters as are referred to it from time to time by the Assembly.

## Authority to call persons

(4) The Standing Committee on Regulations may examine any member of the Executive Council or any public servant designated by any such member

respecting any regulation made under an Act that is under his or her administration.

### Report

(5) The Standing Committee on Regulations shall, from time to time, report to the Assembly its observations, opinions and recommendations. R.S.O. 1980, c. 446, s. 12.

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## TABLE OF CASES

A-G. B.C. v. CRAIG, (1987), 49 M.V.R. 191 (B.C.C.A.)  
 ABBEY (1982), 68 C.C.C. (2d) 394, 29 C.R. (3d) 193 (S.C.C.)  
 ADAMS (1946), 86 C.C.C. 425, 2 C.R. 56 (Ont. H.C.)  
 ADGEY (1973), 23 C.R.N.S. 298, 13 C.C.C. (2d) 177 (S.C.C.)  
 AFRICAN LION SAFARI v. ONTARIO, (1987), 59 O.R. (2d) 65, 1 C.E.L.R. (N.S.) 196 (Ont. C.A.)  
 AGAWA and MALLET (1975), 28 C.C.C. (2d) 379, 31 C.R.N.S. 293 (Ont. C.A.)  
 AITKENHEAD, (1980), 8 Man. R. (2d) 393 (Man. Co. Ct.)  
 AKEY (1990), 1 O.R. (3d) 693 (Ont. Gen. Div.)  
 ALBERT, (1984) 4 O.A.C. 50 (Ont. C.A.)  
 ALLEN (1979), 59 C.C.C. 563, 3 M.V.R. 203 (Ont. Dist. Ct.)  
 ALLEN (1974), 20 C.C.C. (2d) 447 (Ont. C.A.)  
 ALLISON and DINEL, (1983), 33 C.R. (3d) 333 (Ont. C.A.)  
 ALSTON (1985), 36 M.V.R. 67, 22 C.C.C. (3d) 563 (B.C.C.A.)  
 ALWARD (1976), 32 C.C.C. (2d) 416 (N.B.C.A.)  
 AMYOT, [1968] 4 C.C.C. 58 (Ont. Co. Ct.)  
 ANDERS (1982), 25 C.R. (3d) 12 (Ont. Co. Ct.); affirmed 82/05/14 (Ont. C.A.)  
 ANDERSON (1938), 70 C.C.C. 275 (Man. C.A.)  
 ANDERSON, (1914), 22 C.C.C. 455 (Alta. S.C.A.D.)  
 ANDRADE (1985), 13 W.C.B. 289 (Ont. C.A.)  
 ANGELATONI, (1975), 28 C.C.C. (2d) 179 (Ont. C.A.)  
 ANNAN v. MYERS, [1968] 1 O.R. 328 (Co. Ct.)  
 ANTHONY (1982), 16 M.V.R. 160, 52 N.S.R. (2d) 456, 69 C.C.C. (2d) 424, 106 A.P.R. 456 (N.S.C.A.)  
 ARBON (1981), 11 M.V.R. 227, 62 C.C.C. (2d) 11 (Ont. Div. Ct.)  
 ARCHER, (1974), 26 C.C.C. (2d) 225 (Ont. C.A.)  
 ARCHER, [1955] S.C.R. 33, 20 C.R. 181 (S.C.C.)  
 ARCHIBALD (1956), 116 C.C.C. 62, 24 C.R. 50 (Que. S.C.)  
 ARES v. VENNER (1971), 14 D.L.R. (3d) 4, 12 C.R.N.S. 349 (S.C.C.)  
 ARMAND COTE LTEE. (1973), 21 C.C.C. (2d) 525 (Ont. C.A.)  
 ARMSTRONG, (1959), 125 C.C.C. 56 (B.C.C.A.)  
 ARNOLD (1982), 17 M.V.R. 61 (Ont. H.C.)  
 ARROWSMITH, [1975] 1 All E.R. 463 (U.K.C.A.)  
 ARSENAULT (1956), 115 C.C.C. 400 (N.B.C.A.)  
 ART, (1987), 39 C.C.C. (3d) 563, 7 M.V.R. (2d) 132 (B.C.C.A.)  
 ASH-TEMPLE Co. et al. (1949), 93 C.C.C. 267, 8 C.R. 66 (Ont. C.A.)  
 ASHTON (1985), 36 M.V.R. 100 (Ont. Dist. Ct.)  
 ASSU, (1981), 64 C.C.C. (2d) (B.C.C.A.)  
 ATTORNEY GENERAL B.C. v. BENNEWITH (1983), 26 M.V.R. 1 (B.C.S.C.)  
 ATTORNEY GENERAL'S REFERENCE (No. 1), [1975] Q.B. 773 (Eng. C.A.)  
 ATTWOOD, (1891), 20 O.R. 574 (H.C.J.)  
 AUCOIN, [1979] 1 S.C.R. 554 (S.C.C.)  
 AUDY, (No. 2) (1977), 34 C.C.C. (3d) 231 (Ont. C.A.)  
 AULD, (1987), 38 C.C.C. (3d) 43 (Ont. Dist. Ct.), aff'd (1989), 49 C.C.C. (3d) 128 (Ont. C.A.)  
 AULT v. READ (1956), 115 C.C.C. 132 (Alta. C.A.)

AUSTIN, (1942), 79 C.C.C. 83 (Alta. C.A.)  
AYOTTE (1961), 37 C.R. 28 (Ont. Co. Ct.)  
AYRES, (1984), 42 C.R. (3d) 33 (Ont. C.A.)  
AZZOLI (1983), 24 M.V.R. 205 (Ont. Prov. Ct.)  
B.(G.), [1990] 2 S.C.R. 30, 56 C.C.C. (3d) 200 (S.C.C.)  
BABB, (1971), 17 C.R.N.S. 366 (B.C.C.A.)  
BACHMAN, (1987), 78 A.R. 282 (Alta. C.A.)  
BAERT (1981), 28 A.R. 313, leave to appeal to S.C.C. refused 37 N.R. 309  
BAIG, (1985), 20 C.C.C. (3d) 515, 46 C.R. (3d) 222 (Ont. C.A.)  
BAKER v. HUTCHINSON, (1976), 13 O.R. (2d) 591 (C.A.)  
BAKKER, (1986), 48 M.V.R. 190 (Ont. Prov. Ct.)  
BALDASSARA, (1973), 11 C.C.C. (2d) 17 (Ont. H.C.)  
BALDWIN and BAUER (Re) (1981), 54 C.C.C. (2d) 85 (Ont. H.C.)  
BALL and PARRO (1971), 14 C.R.N.S. 238 (Ont. C.A.)  
BANDITO VIDEO LTD. (1986), 52 C.R. (3d) 293 (Ont. Prov. Ct.)  
BANNISTER (1936), 66 C.C.C. 38 (N.B.C.A.)  
BANNISTER, [1964] 2 C.C.C. 299 (N.B. Co. Ct.)  
BANTON (unreported, 16 June 1976, Ont. C.A.)  
BAR, (unreported, P.O.A. Ct., Judicial District of York, Nov. 8, 1983, per Piccinin, J.P.), aff'd Ont. c.a. Oct. 7, 1988, per Dubin A.C.J.O., Zuber and Finlayson J.J.A.)  
BARKER, (1980), 53 C.C.C. (2d) 322 (Alta. C.A.)  
BARNES (1975), 26 C.C.C. (2d) 112 (N.S.C.A.)  
BARON VON LINDBERG, (1977), 66 B.C.L.R. 277 (B.C.S.C.)  
BARON and WERTMAN (1976), 31 C.C.C. (2d) 525 (Ont. C.A.)  
BARRETTE (1976), 29 C.C.C. (2d) 189, 33 C.R.N.S. 377 (S.C.C.)  
BARSALOU (No. 3) (1901), 4 C.C.C. 446 (Que. K.B.)  
BASS and BASS, [1970] 3 C.C.C. 422 (Ont. C.A.)  
BAXTER, (1982), 6 C.C.C. (3d) 447 (Alta. C.A.)  
BAYSHORE TRUST v. RICHARDSON, (1991), 2 O.R. (3d) 522 (Gen. Div.)  
BEANEY, [1970] 1 C.C.C. 48 (Ont. Co. Ct.)  
BEAUCHAMP, [1953] O.R. 422, [1953] 4 D.L.R. 340, 16 C.R. 270 (Ont. C.A.)  
BECKWITH v. SYDEBOTHAM, (1807), 170 E.R. 987  
BEDINGFIELD (1879), 14 Cox C.C. 341 (Eng. Crown Ct.)  
BEDNARZ (1961), 130 C.C.C. 398, 35 C.R. 177 (Ont. C.A.)  
BELAND AND PHILLIPS, (1987), 36 C.C.C. (3d) 481 (S.C.C.)  
BELANGER (1978), 40 C.C.C. (2d) 335 (Ont. H.C.)  
BELANGER, [1970] S.C.R. 567, [1970] 2 C.C.C. 206, 10 C.R.N.S. 373 (S.C.C.)  
BELGAL HOLDINGS LTD., [1967] 3 C.C.C. 34 (Ont. H.C.)  
BELL (1983), 8 C.C.C. (3d) 97, 36 C.R. (3d) 289 (S.C.C.)  
BELL (1968), 64 W.W.R. 668, 4 C.R.N.S. 351, [1969] 2 C.C.C. 9 (Sask. Q.B.)  
BELL (1959), 30 C.R. 60 (B.C.S.C.)  
BELL v. A.G. P.E.I. et al. (1973), 14 C.C.C. (2d) 336, 42 D.L.R. (3d) 82, 1 N.R. 27 (S.C.C.)  
BELL TELEPHONE v. PURCELL LTD., [1962] O.W.N. 184 (Co. Ct.)  
BELL AND BRUCE, (1982), 35 O.R. (2d) 164 (Ont.C.A.), aff'd (1985), 34 O.R. (2d) 164 (S.C.C.)  
BELLIVEAU, (1985), 58 A.R. 334 (Alta. C.A.)  
BENGERT et al. (No. 5) (1980), 53 C.C.C. (2d) 481, 15 C.R. (3d) 114 (B.C.C.A.)  
BENN v. REGISTRAR OF MOTOR VEHICLES (1981), 10 M.V.R. 214, 59 C.C.C. (2d) 421 (Ont. H.C.)  
BERG, [1956] O.W.N. 653 (Ont. Co. Ct.)  
BERRIMAN, (1981), 45 M.V.R. (Nfld. C.A.)  
BETTEREST VINYL LTD., (1989), 52 C.C.C. (3d) 441 (B.C.C.A.)  
BEVAN, (1991), 63 C.C.C. (3d) 333 (Ont. C.A.)

BIBEAU, EDWARD and RAYMOND STONE (16 Jan. 84), unreported (Ont. Co. Ct., Northumberland Cty.)  
 BICKERTON, (1985), 46 C.R. (3d) 2868 (Ont. H.C.)  
 BICKNELL, (1988), 41 C.C.C. (3d) 545 (B.C.C.A.)  
 BIGELOW (1982), 69 C.C.C. (2d) 204 (Ont. C.A.)  
 BIGIONI, (unreported, Ont. C.A., Sept. 13, 1988, per Brooke, Krever and Griffiths J.J.A.)  
 BILUK (1981), 14 M.V.R. 53 (Ont. Prov. Ct.)  
 BIXBY, (1987), 7 M.V.R. (2d) 196 (Nfld. S. T.D.)  
 BLACK, (1989), 70 C.R. (3d) 97, 50 C.C.C. (3d) 1 (C.C.C.)  
 BLACK, [1970] 4 C.C.C. 251 (B.C.C.A.)  
 BLACKBIRD (1983), 22 M.V.R. 130 (Man. Prov. Ct.)  
 BLACKBURN (1980), 25 B.C.L.R. 218, 57 C.C.C. 7 (B.C.C.A.)  
 BLACKMORE, (1970), 2 C.C.C. (2d) 397 (Ont. C.A.) aff'd. (1970), 2 C.C.C. (2d) 397 (S.C.C.)  
 BLAND (1974), 20 C.C.C. 332 (Ont. C.A.)  
 BLASKO (Re) (1976), 29 C.C.C. (2d) 321, 33 C.R.N.S. 227 (Ont. S.C.)  
 BLETA, [1964] S.C.R. 561, 44 C.R. 193 (S.C.C.)  
 BLOOMFIELD ET AL., (1973), 10 C.C.C. (2d) 398 (N.B.S.C.A.D.)  
 BLOOMFIELD v. SECURITY INSURANCE CO., [1986] I.L.R. para. 1-2125 (Ont. Prov. Ct.)  
 BOARDMAN (1979), 47 C.C.C. (2d) 334 (Ont. Co. Ct.)  
 BOBCAYGEON, Village of (1974), 17 C.C.C. (2d) 236 (Ont. C.A.)  
 BOISSONNEAULT, (1986), 29 C.C.C. (3d) 345 (Ont. C.A.)  
 BOISVENU (1975), 17 M.V.R. 86 (Ont. H.C.)  
 BOIVIN (1978), 44 C.C.C. (2d) 348, 1 M.V.R. 44, 93 D.L.R. (3d) 557 (Ont. H.C.)  
 BOLAND, (1977), 33 C.C.C. (2d) 211 (Ont. C.A.)  
 BOLAND v. GLOBE AND MAIL, [1961] O.R. 712 (C.A.)  
 BOND (Re) (1936), 66 C.C.C. 271 (N.S.S.C.)  
 BONLI v. GOSSELIN Prov. J. and A.G. of SASKATCHEWAN (1982), 25 C.R. (3d) 303 (Sask. C.A.)  
 BOOTH, (1984), 15 C.C.C. (3d) 237 (B.C.C.A.)  
 BORAN et al. v. WENGER, [1942] O.W.N. 185  
 BORDEN (1981), 61 C.C.C. (2d) 122, 22 C.R. (3d) 207 (Ont. H.C.)  
 BOTHWELL, (1986), 45 M.V.R. 1 (Ont. C.A.)  
 BOUCHARD (1973), 12 C.C.C. (2d) 514, 24 C.R.N.S. 31 (N.S. Co. Ct.)  
 BOUCHER (1955), 110 C.C.C. 255, 24 C.R. 291 (S.C.C.)  
 BOUDREAU (1949), 79 C.C.C. 221, 7 C.R. 427 (S.C.C.)  
 BOURQUE (1985), 38 M.V.R. 110 (Alta. Q.B.)  
 BOUVIER, (1984), 11 C.C.C. (3d) 257 (Ont. C.A.) aff'd (1985), 22 C.C.C. (3d) 576 (S.C.C.)  
 BOYCE (1976), 23 C.C.C. (2d) 16, 28 C.R.N.S. 336 (Ont. C.A.)  
 BOYCE and MEADE (31 May, 1974), unreported (Ont. Co. Ct.)  
 BOYDE, (1987), 4 M.V.R. (2d) 113 (B.C. Prov. Ct.)  
 BOYLE, (1975), 23 C.C.C. (2d) 379 (Sask. Q.B.)  
 BRADBURY (1973), 23 C.R.N.S. 293, 14 C.C.C. (2d) 139 (Ont. C.A.)  
 BRAND (Re) (1975), 20 C.C.C. (2d) 253 (Alta. S.C.)  
 BRAUMBERGER, (1967), 62 W.W.R. 285 (B.C.C.A.)  
 BRENNAN, (1989), 52 C.C.C. (3d) 366, 18 M.V.R. (2d) 161 (Ont. C.A.)  
 BRESSETTE v. WOLFE, (1984), 48 O.R. (2d) 114 (Co. Ct.)  
 BREWSTER v. SEWELL, (1820), 106 E.R.  
 BRINTON v SIENIEWICZ, (1969), 1 D.L.R. (3d) 545 (N.S.S.C.T.D.)  
 BRISSON; KENNEDY (1985), 37 M.V.R. 313 (Ont. C.A.)  
 BROCKMAN (unreported, Ont. Prov. Ct., Judicial District of York, May 13, 1982 per Dnieper P.C.J.)  
 BRODIE, [1936] S.C.R. 186, 65 C.C.C. 289 (S.C.C.)  
 BROWN, (1986) 71 A.R. 137 (Q.B.)  
 BROWN (Re) (1975), 11 O.R. (2d) 7, 30 C.C.C. (2d) 300 (Ont. H.C.J.)



BROWN AND BALLMAN, (1982), 69 C.C.C. (2d) 301 (Alta. C.A.)  
BROWNE v. DUNN (1893), 6 R. 67 (H. of L.)  
BROWNE and ANGUS (1951), 99 C.C.C. 141, 11 C.R. 297 (B.C.C.A.)  
BRUNO (1975), 27 C.C.C. (2d) 318 (Ont. C.A.)  
BRYANT, (1980), 54 C.C.C. (2d) 54 (Ont. H.C.)  
BRYDGES, (1990), 74 C.R. (3d) 129, 53 C.C.C. (3d) 330 (S.C.C.)  
BUCHANAN (1967), 10 Crim. L.Q. 246 (Ont. Mag. Ct.)  
BUCHBINDER, Re (1985), 20 C.C.C. (3d) 481, 47 C.R. (3d) 135 (Ont. C.A.)  
BUDDEN, [1964] 2 C.C.C. 290 (Ont. Mag. Ct.)  
BUDGET CAR RENTALS (Canada) Ltd. (1981), 31 O.R. (2d) 161, 9 M.V.R. 52, 20 C.R. (3d) 66, 57 C.C.C. (2d) 201, 121 D.L.R. 311 (Ont. C.A.)  
BUDNY v. SENECHAL, (1990), 27 M.V.R. (2d) 103 (Ont. Gen. Div.)  
BUNNISS (1965), 44 C.R. 262 (B.C. Co. Ct.)  
BUNTING (1983), 26 M.V.R. 23 (B.C. Co. Ct.)  
BURGE, (1988), 72 Nfld. & P.E.I.R. 158 (P.E.I.S.C.)  
BURNS v. BIDDER, [1967] 2 Q.B. 227 (Div. Ct.)  
BURTON, [1970] 3 C.C.C. 381 (Ont. H.C.), leave to appeal to Ont. C.A. refused *ibid*  
BUSH, (1888), 15 O.R. 398 (C.A.)  
BUTTON, (1974), 21 C.C.C. (2d) 371 (Ont. Co. Ct.)  
BUTTRUM v. UDELL, [1925] 3 D.L.R. 45, 57 O.L.R. 97 (Ont. C.A.)  
C.B.C. v. CORDEAU, [1979] 2 S.C.R. 618, 48 C.C.C. (2d) 289  
C.C.A.S. OF HAMILTON-WENTWORTH v. S.(J.C.), (1986), 9 C.P.C. (2D) 265 (Ont. U.F.C.)  
CACHIA (1974), 17 C.C.C. (2d) 173 (Ont. H.C.)  
CALDER, (1988, 86 N.S.R. (2d) 91 (N.S. Co. Ct.)  
CALDWELL, (1990), 95 N.S.R. (2d) 272 (N.S.C.A.)  
CALLAHAN (1983), 21 M.V.R. 127 (Ont. H.C.)  
CAMERON (Re) (1980), 48 C.C.C. (2d) 222 (Sask. Q.B.)  
CAMPBELL, (1989), 76 N.P.E.I.R. 346 (P.E.I.T.D.)  
CAMPBELL, (1980), 4 M.V.R. 214 (Ont. Co. Ct.)  
CAMPBELL (1977), 17 O.R. (2d) 673, 38 C.C.C. (2d) 6, 1 C.R. (3d) 309 (Ont. C.A.)  
CAMPBELL v. A.G. ONTARIO, (1987), 31 C.C.C. (3d) 289 (Ont. H.C.), *aff'd* (1987), 35 C.C.C. (3d) 480N (Ont. C.A.)  
CAMPBELL AND MLYNARCHUK, (1972), 10 C.C.C. (2d) 26, 21 C.R.N.S. 273 (Alta. Dist. Ct.)  
CANADIAN TIRE CORP. LTD., (1987), 16 C.P.R. (3d) 465 (Ont. Dist. Ct.)  
CANADIAN GENERAL ELECTRIC CO. LTD et al. (1974), 17 C.C.C. (2d) 433 (Ont. H.C.J.)  
CANCOIL THERMAL CORPORATION v. PARKINSON, (1986), 27 C.C.C. (3d) 285, 52 C.R. (3d) 188 (Ont. C.A.)  
CANNING (1937), 68 C.C.C. 321 (S.C.C.)  
CANNING v. WOOD, (1918), 44 D.L.R. 525 (N.S.C.A.)  
CANTON, (1989), 51 C.C.C. (3d) 415 (Ont. C.A.)  
CANUTE, [1983] 5 W.W.R. 566 (B.C. Co. Ct.)  
CARDINAL v. A.G. Alta., [1974] S.C.R. 695, 13 C.C.C. (2d) 1  
CAREFOOT (1948), 90 C.C.C. 331 (Ont. H.C.)  
CAREY, [1973] 2 W.W.R. 267, 10 C.C.C. (2d) 330 (Man. C.A.)  
CARLSON v. CHOCHINOV, [1947] 1 W.W.R. 755, [1947] 2 D.L.R. 64 (Man. K.B.); *affirmed* [1948] 4 D.L.R. 556 (Man. C.A.)  
CARPENTER (1982), 1 C.C.C. (3d) 149, 31 C.R. (3d) 261 (Ont. C.A.)  
CARROLL (1981), 35 O.R. (2d) 532, 14 M.V.R. 175 (Ont. Co. Ct.)  
CARSON (1983), 20 M.V.R. 54 (Ont. C.A.)  
CARTER, , (1985), 34 M.V.R. 294 (Nfld. Dist. Ct.)  
CARTMAN, [1940] N.Z.L.R. 725 (N.Z.S.C.)

CASEY (1987), 80 N.S.R. (2d) 247 (C.A.)  
 CASSIBO (1983), 70 C.C.C. (2d) 498 (Ont. C.A.)  
 CASSIDY (1975), 18 C.C.C. (2d) 1 (N.B.C.A.)  
 CASSIDY and LETENDRE, [1963] 2 C.C.C. 219, 40 C.R. 171 (Alta. C.A.)  
 CATELLIER (1948), 93 C.C.C. 394, 6 C.R. 466 (Que. C.A.)  
 CATHOLIQUE, (1979), 49 C.C.C. (2d) 65 (N.W.T.S.C.)  
 CATLING, (1984), 29 C.C.C. (3d) 168 (Alta. Q.B.)  
 CAUGHLIN, (1987), 40 C.C.C. (3d) 247 (B.C. Co. Ct.)  
 CAVALLARO, (1989), 96 A.R. 315 (Alta. Prov. Ct.)  
 CENTURY 21 RAMOS REALTY INC. AND RAMOS, (1987), 32 C.C.C. (3d) 353 (Ont. C.A.)  
 CERNIUK (1947), 91 C.C.C. 56, 5 C.R. 234 (B.C.C.A.)  
 CETINSKI v. FORMAN, [1972] 2 O.R. 484, 26 D.L.R. (3d) 49 (Ont. H.C.)  
 CHALLICE, (1979), 45 C.C.C. (2d) 546 (Ont. C.A.)  
 CHANDRA (1976), 29 C.C.C. (2d) 570 (B.C.C.A.)  
 CHANDRASEKERA, [1937] A.C. 220 (P.C.)  
 CHAPIN (1979), 45 C.C.C. (2d) 333, 10 C.R. (3d) 371 (S.C.C.)  
 CHAREST (1990), 57 C.C.C. (3d) 312 (Que. C.A.)  
 CHARTRAND (1971), 21 C.R.N.S. 49 (Que. C.A.)  
 CHAULK, (1990), 62 C.C.C. (3d) 193 (S.C.C.)  
 CHEW, [1968] 2 C.C.C. 127 (Ont. C.A.)  
 CHIASSON (1982), 27 C.R. (3d) 361, 66 C.C.C. (2d) 195 (N.B.C.A.); affirmed (1984), 11 C.C.C. (3d) 385 (S.C.C.)  
 CHIMIENTI, et al., (1980), 17 C.R. (3d) 306 (Ont. S.C.)  
 CHIMIENTI, Re:, (1980), 17 C.R. (3d) 306 (Ont. H.C.)  
 CHOW, (1991), 29 M.V.R. (2d) 7 (Alta. Q.B.)  
 CHOW (1978), 43 C.C.C. (2d) 215 (B.C.C.A.)  
 CHRISTIE, [1914] A.C. 545, 10 Cr. App. R. 141 (H.L.)  
 CHRISTMAN (1984), 29 M.V.R. 1 (Alta. C.A.)  
 CHURCH OF SCIENTOLOGY OF TORONTO, (1974), 18 C.C.C. (2d) 546  
 CIANI (unreported, Ont. Prov. Ct., Judicial District of York, Dec. 23, 1986, per Paris P.C.J.)  
 CIARNELLO, (1979), 12 B.C.L.R. 394 (Prov. Ct.)  
 CIE CHIMIQUE CLOUGH (1987), 1 M.V.R. (2d) 1 (Ont. H.C.)  
 CIRILLO, (1981), 11 M.V.R. 16 (Ont. Co. Ct.)  
 CLAIBORNE INDUSTRIES v. NATIONAL BANK OF CANADA, (1986), 28 D.L.R. (4th) 695 (Ont. H.C.)  
 CLARK (1978), 41 C.C.C. (2d) 561, 1 C.R. (3d) 368 (B.C.C.A.)  
 CLARK (1974), 3 O.R. (2d) 716, 18 C.C.C. (2d) 52 (Ont. C.A.)  
 CLARKE, (1984), 27 M.V.R. 65 (B.C. Co. Ct.)  
 CLARKSON, [1986] 1 S.C.R. 383  
 CLEMENTS (1983), 21 M.V.R. 74 (Alta. Prov. Ct.)  
 CLOUSTON, (1986), 16 W.C.B. 287 (Ont. Dist. Ct.)  
 CLOUTIER, (1979), 48 C.C.C. (2d) 1 (S.C.C.)  
 CODERRE v. ETHIER, (1978), 19 O.R. (2d) 503 (Ont. H.C.)  
 COFFIN (Re) (1956), 114 C.C.C. 1, 23 C.R. 1 (S.C.C.)  
 COHN (1984), 15 C.C.C. (3d) 150 (Ont. C.A.)  
 COLE, (1980), 53 C.C.C. (2d) 269 (Ont. C.A.)  
 COLE (Re) (1983), 70 C.C.C. (2d) 460 (Ont. H.C.)  
 COLEMAN (1985), 31 M.V.R. 258 (Man. Q.B.)  
 COLLICOTT, (1987), N.B.R. (2d) 369 (N.B.Q.B.)  
 COLLINS (1989), 48 C.C.C. (3d) 343, 69 C.R. (3d) 235 (Ont. C.A.)  
 COLLINS, (1987), 33 C.C.C. (3d) 1 (S.C.C.)  
 COMEAU, (1960), 129 C.C.C. 326 (N.B.C.A.).

CONKIE (1978), 39 C.C.C. (2d) 408, 3 C.R. (3d) 7 (Alta. C.A.)  
CONLEY (1979), 47 C.C.C. (2d) 359 (Alta. C.A.)  
CONLON, (1990), 1 O.R. (3d) 188 (Ont. C.A.)  
CONNICK, (1987), 84 N.B.R. (2d) 336 (N.B.Q.B.)  
CONNOR v. TOWNSHIP OF BRANT (1914), 6 O.W.N. 206 (Ont. C.A.)  
CONTAINER MATERIALS LTD., [1940] 4 D.L.R. 293 (Ont. C.A.)  
CONWAY, [1989] 1 S.C.R. 1659, 49 C.C.C. (3d) 7  
COOK, (1978), 10 B.C.L.R. 84 (B.C.C.A.)  
COOK (1960), 127 C.C.C. 287, 33 C.R. 126 (Alta. C.A.)  
COOKE, (1989), 19 M.V.R. (2d) 284 (Sask. Q.B.)  
COOMBS, (1977), 35 C.C.C. (2d) 85 (B.C.C.A.)  
COOPER (1977), 34 C.C.C. (2d) 18, 37 C.R.N.S. 1 (S.C.C.)  
CORBETT, (1988), 41 C.C.C. (3d) 385 (S.C.C.)  
CORBETT, (1973), 11 C.C.C. (3d) 137 (B.C.C.A.)  
CORMIER (1974), 25 C.R.N.S. 94 (Que. C.A.)  
CORMIER, (1968), 6 C.R.N.S. 202 (Que. C.A.)  
COSGROVE (1977), 34 C.C.C. (2d) 100 (Ont. C.A.)  
COSTEN, [1989] Crim. L.R. 601 (C.A.)  
COTE, (1978), 33 C.C.C. (2d) 353, 40 C.R.N.S. 308 (S.C.C.)  
COTRONI; PAPALIA (1979), 45 C.C.C. (2d) 1, 7 C.R. (3d) 185, 11 C.R. (3d) 150 (S.C.C.)  
COTTER, (unreported, Ont. Ct.Prov. Div.), leave to appeal refused February 14, 1991, per Lacourciere J.A.)  
COUGLE, (1981), 34 N.B.R. (2d) (N.B.Q.B.)  
COURCHENE (1983), 25 M.V.R. 204, [1984] 1 W.W.R. 522 (Man. Prov. Ct.)  
COUSINEAU, (1982), 1 C.C.C. (3d) 293 (Ont. C.A.)  
CRAIG (1977), 37 C.R.N.S. 398 (B.C.S.C.)  
CRANE, (1985), 55 Nfld. & P.E.I.R. 340 (Nfld. Dist. Ct.)  
CRAWFORD, (1984), 33 M.V.R. 45 (Ont. Co. Ct.)  
CREEMER and CORMIER (1967), 1 C.R.N.S. 146 (N.S.C.A.)  
CRNECK, (1980), 55 C.C.C. (2d) 1 (Ont. H.C.)  
CROFT, (1979), N.S.R. (2d) 344 (N.S.C.A.)  
CRUIKSHANKS, (1990), 58 C.C.C. (3d) 26 (B.C.C.A.)  
CULLEN, (1989), 52 C.C.C. (3d) 459 (Ont. C.A.)  
CUNNINGHAM (1979), 45 C.C.C. (2d) 544 (Ont. Div. Ct.)  
CURRIE and NIAGRA ESCARPMENT COMMISSION Re: (1984), 16 C.C.C. (3d) 193, 14 D.L.R. (4th) 65 (Ont. C.A.)  
CURRIE and THE NIAGARA ESCARPMENT COMMISSION (Re) (1984), 13 C.C.C. (3d) 35 (Ont. H.C.J.)  
CZIPPS (1979), 48 C.C.C. (2d) 166, 12 C.R. (3d) 193 (Ont. C.A.)  
D.(A.), (1990), 37 O.A.C. 267  
D.(E.), (1990), 57 C.C.C. (3d) 151 (Ont. C.A.)  
D.(T.C.), (1987), 38 C.C.C. (3d) 434 (Ont. C.A.)  
D'ASTOUS v. BAIE-COMEAU, (1992), 74 C.C.C. (3d) 73 (Que. C.A.)  
DAGELMAN, (1982), 8 W.C.B. 408 (Ont. Dist. Ct.)  
DAHLE (1983), 19 M.V.R. 262 (Nfld. Dist. Ct.)  
DAHMER, [1983] 2 W.W.R. 407 (Sask. Q.B.)  
DANIELS, (1990), 60 C.C.C. (3d) 392 (B.C.C.A.)  
DANSON (1982), 66 C.C.C. (2d) 369 (Ont. C.A.)  
DARVILLE (1956), 116 C.C.C. 113 (S.C.C.)  
DASILVA, (unreported, Ont. Prov. Ct., Nov. 24, 1986, per LANGDON P.C.J.)  
DASS (1979), 8 C.R. (3d) 224, 47 C.C.C. 194 (Man. C.A.)  
DAUPHNEY (Re) (1975), 29 C.C.C. (2d) 236 (B.C.S.C.)

DAVEY, [1970] 2 C.C.C. 351, 6 C.R.N.S. 288 (B.C.S.C.)  
 DAVID-WHALLEY, (1979), 4 W.C.B. 86 (Ont. Co. Ct.)  
 DAVIES, (1990), 56 C.C.C. (3d) 321 (Ont. Prov. Ct.)  
 DAVIS (No. 2) (1977), 35 C.C.C. 464 (Alta. C.A.)  
 DAVIS, [1952] O.W.N. 469 (Co. Ct.)  
 DAVIS, [1970] 3 C.C.C. 260 (Alta. C.A.)  
 DAVISON et al. (1974), 6 O.R. (2d) 103, 20 C.C.C. (2d) 424 (Ont. C.A.)  
 DAY (1985), 36 M.V.R. 221 (Ont. Dist. Ct.)  
 De TONNANCOURT et al. (1955), 114 C.C.C. 240 (Man. Q.B.); aff'd 115 C.C.C. 154, 24 C.R. 19 (Man. C.A.)  
 DEACON (1947), 89 C.C.C. 1, 3 C.R. 265 (S.C.C.)  
 DEAN (1985), 17 C.C.C. (3d) 410 (Alta. Q.B.)  
 DEBOU, [1978] 2 W.W.R. 381 (B.C. Co. Ct.)  
 DEBRUGE (1927), 47 C.C.C. 31 (Ont. S.C.)  
 DECLERQ, [1969] 1 C.C.C. 197, 4 C.R.N.S. 205 (S.C.C.)  
 DEDMAN (1985), 20 C.C.C. (3d) 97, 46 C.R. (3d) 193, 34 M.V.R. 1, 60 N.R. 34 (S.C.C.)  
 DEEP v. WOOD, (1983), 1443 D.L.R. (3d) 246 (Ont. C.A.)  
 DEITRICH, (1970), 1 C.C.C. (2d) 49, 11 C.R.N.S. 22 (Ont. C.A.)  
 DELAFOSSE, (1988), 47 C.C.C. (3d) 165 (Que. C.A.)  
 DELTA ACCEPTANCE CO. LTD. v. REDMAN, [1966] 2 O.R. 37 (C.A.)  
 DEMELO (1983), 3 C.R.R. 376 (B.C. Prov. Ct.)  
 DEMETER (1976), 25 C.C.C. (2d) 417 (Ont. C.A.); app'd (1977), 34 C.C.C. (2d) 137 (S.C.C.)  
 DEMPSEY v. CANADA, (1986), 65 N.R. 295 (Fed. Ct.)  
 DENIS, [1967] 1 C.C.C. 196 (Que. C.A.)  
 DENNY v. BREWER, [1961] O.W.N. 161 (Co. Ct.)  
 DEOL, GILL AND RANDEV (1979), 51 C.C.C. (2d) 40, 12 C.R. (3d) 262 (Alta. Q.B.)  
 DESHAIES et al, [1966] 3 C.C.C. 176 (Que. Q.B.)  
 DEUTSCH (1983), 5 C.C.C. (3d) 41 (Ont. C.A.), aff'd [1986] 2 S.C.R. 2, 27 C.C.C. (3d) 385  
 DEVASAGAYAM (1990), 61 C.C.C. (3d) 404 (Ont. Gen. Div.)  
 DEVINEY, (1990), 1 O.R. (3d) 69 (Ont. Gen. Div.)  
 DI-FAZIO, (unreported, Ont. Prov. Ct., July 13, 1987, per Darragh P.C.J.)  
 DICK, [1969] 1 C.C.C. 147 (Ont. S.C.)  
 DICK, [1985] 2 S.C.R. 309, 22 C.C.C. (3d) 129  
 DILABBio, [1965] 4 C.C.C. 295 (Ont. C.A.)  
 DILORENZO; BANCROFT (1984), 26 M.V.R. 259, 2 O.A.C. 62, 45 O.R. (2d) 385, 11 C.C.C. (3d) 13 (Ont. C.A.)  
 DIVIZIO, (1986), 32 C.C.C. (3d) 239 (Ont. Dist. Ct.)  
 DMITREW, (1987), 49 M.V.R. 64 (Ont. Dist. Ct.)  
 DOBBERTHEIN, (1973), 13 C.C.C. (2d) 513 (Alta. S.C.A.D.), aff'd (1974), 18 C.C.C. (2d) 449 (S.C.C.)  
 DODGE, [1966] 1 O.R. 633 (Ont. H.C.)  
 DODSON, (1972), 9 C.C.C. (2d) 358 (Ont. H.C.)  
 DOE, (1986), 31 C.C.C. (3d) 353 (Ont. Dist. Ct.)  
 DOHERTY (1899), 3 C.C.C. 505 (N.S.S.C.)  
 DOIRON (1958), 124 C.C.C. 156 (N.B.C.A.)  
 DOMBROWSKI, (1985), 18 C.C.C. (3d) 164, 44 C.R. (3d) 1 (Sask. C.A.)  
 DONLINE HAULAGE INC. (1980), 4 M.V.R. 241 (Ont. Co. Ct.)  
 DORE (1959), 125 C.C.C. 194, 30 C.R. 281 (Que. C.A.)  
 DORMANDY, (May 15, 1980), 4 W.C.B. 477 (Ont. H.C.)  
 DORO (16 July, 1984), unreported (B.C. Co. Ct.)  
 DOUCETTE, (1987), 48 M.V.R. 110 (N.S.C.A.)  
 DOUD, (1982), 18 M.V.R. 146 (Sask. Prov. Ct.)



DOUGHTY (1968), 5 C.R.N.S. 98 (Ont. Mag. Ct.)  
DOVCO HOLDINGS LTD. (1977), 34 C.C.C. (2d) 317 (Ont. Div. Ct.)  
DOW CHEMICAL CANADA INC., (1987), 1 C.E.L.R. (N.S.) 167 (Ont. Prov. Ct.)  
DOWSON and R. (Re), (1983), 7 C.C.C. (3d) 527 (S.C.C.)  
DOZ, (1985), 19 C.C.C. (3d) 434 (Alta. C.A.)  
DRAPER v. JACKLYN [1970], 9 D.L.R. (3d) 264 (S.C.C.)  
DRENNAN, [1986] Ont. D. Crim. Conv. 5570-08 (Ont. Dist. Ct.)  
DUBOIS, (1976), 30 C.C.C. (2d) 412 (Ont. C.A.)  
DUNBAR AND LOGAN, (1982), 68 C.C.C. (2d) 13 (Ont. C.A.)  
DUNCAN (Re) (1957), 11 D.L.R. (2d) 616 (S.C.C.)  
DUNLOP and SYLVESTER (1979), 47 C.C.C. (2d) 93, 8 C.R. (3d) 349, 12 C.R. (3d) 339 (S.C.C.)  
DUNN, (1990), 56 C.C.C. (3d) 538 (B.C.C.A.)  
DUNN, (1977), 21 N.S.R. (2d) 334 (C.A.)  
DUNNING, (1979), 50 C.C.C. (2d) 296 (Ont. C.A.)  
DUPERON and BENCE, [1965] 3 C.C.C. 344 (Sask. C.A.)  
DUPLIN (1959), 126 C.C.C. 400, 33 C.R. 43 (B.C.S.C.)  
DUPONT, (1986), 42 M.V.R. 138 (Ont. Dist. Ct.)  
DUPUIS, (unreported, Ont. H.C., Feb. 2, 1980, per Rutherford J.)  
DUROCHER, [1963] 1 C.C.C. 17, 41 C.R. 350 (B.C.C.A.)  
DYCK, [1970] 2 C.C.C. (2d) 283, 8 C.R.N.S. 191 (B.C.C.A.)  
DYNES, (unreported, Ont. H.C., July 22, 1977, per WETHERSTON J.)  
E.B.M. (1988), 4 W.C.B. (2d) 401 (Ont. Prov. Ct.)  
EAGLES (1976), 31 C.C.C. (2d) 417 (Ont. H.C.J.)  
ECCLES AND BOURQUE, (1974), (2d) 129 (S.C.C.)  
ED MILLER SALES LTD. v. CATERPILLAR TRACTOR LTD. (1991), 3 C.P.C. (3d) 231 (Alta. Q.B.)  
EDEN, [1970] 3 C.C.C. 280 (Ont. C.A.)  
EDWARDS v. JONES, [1947] 1 K.B. 659 (Eng. Div. Ct.)  
EDWARDS, [1975] Q.B. 27 (C.A.)  
EGAN: PROVINCIAL SECRETARY OF P.E.I. v. EGAN, [1941] S.C.R. 396, 76 C.C.C. 227, [1941] 3 D.L.R. 305 (S.C.C.)  
ELDER (1925), 44 C.C.C. 75 (Man. C.A.)  
ELIJAH (1989), 53 C.C.C. (3d) 36 (Ont. Dist. Ct.)  
ELLIOT (1981), 12 M.V.R. 35 (Ont. C.A.)  
ELLIOTT, (1981), 12 M.V.R. 35 (Ont. C.A.)  
ELLIS, (1947), 88 C.C.C. 430 (Sask. Mag. Ct.)  
ELLIS-DON LTD., (1992), 71 C.C.C. (3d) 63 (S.C.C.)  
ELM TREE NURSING HOME INC., (1987), 20 O.A.C. 277 (C.A.)  
ELMOSRI, (1985), 23 C.C.C. (3d) 503 (Ont. C.A.)  
EMKEIT et al. (1971), 3 C.C.C. (2d) 309, 14 C.R.N.S. 290 (Alta. C.A.)  
ERICKSON, (1984), 13 C.C.C. (3d) 269  
ERTEL, (1987), 35 C.C.C. (3d) 398 (Ont. C.A.) leave to appeal to S.C.C. refused (1987), 36 C.C.C. (3d) vi  
ERVEN (1978), 44 C.C.C. (2d) 76, 6 C.R. (3d) 97 (S.C.C.)  
EVANS, (1988), 45 C.C.C. (3d) 523 (B.C.C.A.), rev'd on other grounds, (1991), 63 C.C.C. (3d) 289 (S.C.C.)  
EVANS v. LATULIPPE, (1990), O.A.C. 295 (Div. Ct.)  
EWART, (1989), 52 C.C.C. (3d) 280 (B.C.C.A.)  
EWING and KEARNEY (1974), 25 C.R.N.S. 130, 15 C.C.C. (2d) 107 (B.C.S.C.); aff'd (1975), 29 C.R.N.S. 227, 18 C.C.C. (2d) 357 (B.C.C.A.)  
EXHIBITORS INC. v. ALLEN, (1989), 70 O.R. (2d) 103 (Ont. H.C.)  
FAGAN (1953), 107 C.C.C. 259 (Ont. Co.Ct.)



FAMOUS PLAYERS THEATRE, (1932), 58 C.C.C. 50 (Ont.C.A.)  
 FARGNOLI, [1957] O.R. 140 (Ont. C.A.)  
 FAULDS, (1987), 36 C.C.C. (3d) 566 (Ont. C.A.)  
 FEDORUK, [1966] 3 C.C.C. 118 (Sask. C.A.)  
 FELIPA (1986), 40 M.V.R. 316 (Ont. C.A.)  
 FERBER, (1987), 36 C.C.C. (3d) 157 (Alta. C.A.)  
 FERRIS (1985), 33 M.V.R. 167 (Alta. Prov. Ct.)  
 FEX (1973), 12 C.C.C. (2d) 239 (Ont. S.C.); (1973), 14 C.C.C. (2d) 188 (Ont. C.A.)  
 FIALKOW, [1963] 2 C.C.C. 42 (Ont. C.A.)  
 FICKO v. ONTARIO (REGISTRAR OF MOTOR VEHICLES), (1989), 13 M.V.R. (2d) 30 (Ont. C.A.)  
 FIELDS, (1986), (1986), 28 C.C.C. (3d) 353, 53 C.R. (3d) 260 (Ont. C.A.)  
 FIGUEIRA, (1981), 63 C.C.C. (2d) 409 (Ont. C.A.)  
 FILLMORE (1977), 76 N.S.R. (2d) 631, 40 A.P.R. 631 (N.S. Co. Ct.)  
 FINLAY AND GRELLETTE, (1985), 23 C.C.C. (3d) 48 (Ont. C.A.)  
 FIRST NATIONAL BANK v. CHRISTY CROPS LTD., (1981), 47 N.S.R. (2d) 224 (N.S.C.A.)  
 FISCHER (1987), 31 C.C.C. (3d) 303 (Sask. C.A.)  
 FISHER (1961), 34 C.R. 320 (Ont. C.A.)  
 FISHER et al. (1984), 29 M.V.R. 137, 42 C.R. (3d) 291 (Man. Prov. Ct.)  
 FITZGERALD, SCHOENBERGER, (1981), 61 C.C.C. (2d) 504 (Ont. H.C.J.)  
 FLANNERY (1982), 15 M.V.R. 116, 15 Man. R. (2d) 162 (Man. Co. Ct.)  
 FLEMING, (1972), 7 C.C.C. (2d) 57 (N.S. Co. Ct.)  
 FLEMING v. TORONTO RAILWAY CO. (1912), 25 O.L.R. 317 (Ont. C.A.)  
 FLYNN (1955), 111 C.C.C. 129, 21 C.R. 1 (Ont. C.A.)  
 FOLEY v GARES (1989), 53 C.C.C. (3d) 82 (Sask. C.A.)  
 FOLLETT, (1987), 3 W.C.B. (2d) 192 (Ont. Dist. Ct.)  
 FORRESTER (Re) (1977), 33 C.C.C. (2d) 221, 37 C.R.N.S. 320 (Alta. S.C.)  
 FOUGERE, (1988), 40 C.C.C. (3d) 3555 (N.B.C.A.)  
 FOX (1976), 30 C.C.C. (2d) 330 (Ont. C.A.)  
 FOXTON (1920), 34 C.C.C. 9 (Ont. S.C.)  
 FRAILLION, (1990), 11 W.C.B. (2d) 554 (Que. C.A.)  
 FRANCIS, [1988] 1 S.C.R. 1025, 41 C.C.C. (3d) 217  
 FRANK (1977), 34 C.C.C. (2d) 209 (S.C.C.)  
 FRANKLIN, (unreported, Ont. Gen. Div., Dec. 3, 1991, per Mullin J.)  
 FRASER (1984), 28 M.V.R. 209 (Ont. Co. Ct.)  
 FREDERICK (1931), 57 C.C.C. 340 (B.C.C.A.)  
 FREED, (1992), 37 M.V.R. (2d) 92 (Sask. C.A.)  
 FREEDMAN (1978), 2 C.R. (3d) 345 (Ont. Co.Ct.)  
 FROST (1839), 173 E.R. 771 (Monmouth Special Commission)  
 FRYE v. U.S., 293 F. 1013 (U.S.C.A., 1923)  
 FUCHS (1972), 7 C.C.C. (2d) 366 (B.C.S.C.)  
 FURLONG, (unreported, Ont. Prov. Ct., Judicial District of Simcoe, Oct. 24, 1985, per Palmer P.C.J.)  
 FUSHTOR (1946), 85 C.C.C. 283, 1 C.R. 351 (Sask. C.A.)  
 GALLAGHER, (1985) 35 M.V.R. 228 (Nfld. Dist. Ct.)  
 GALLANT, (1988), 6 W.C.B. (2d) 388 (Ont. Prov. Ct.)  
 GALLANT (1965), 47 C.R. 309 (P.E.I.S.C.)  
 GALLANT (1944), 83 C.C.C. 49 (P.E.I.S.C.)  
 GALPIN, (1977), 34 C.C.C. (2d) 545 (Ont. C.A.)  
 GARDINER (1982), 68 C.C.C. (2d) 477, 30 C.R. (3d) 289 (S.C.C.)  
 GAREAU, (unreported, March 22, 1990, Ont. Prov. Ct. County of Middlesex, per Menzies P.C.J.)  
 GARIEPY (1978), 40 C.C.C. (2d) 345 (Que. S.C.)  
 GARIFOLI, (1988), 41 C.C.C. (3d) 97, 64 C.R. (3d) 193 (Ont. C.A.), rev'd on other grounds, (1990), 60

C.C.C. (3d) 161 (S.C.C.)  
GAUTHIER (1977), 36 C.C.C. (2d) 420 (Ont. H.C.)  
GAUTHIER (1976), 27 C.C.C. (2d) 14, 33 C.R.N.S. 46 (S.C.C.)  
GEORGE, (1980), 8 M.V.R. 132 (Ont. Dist. Ct.)  
GEORGE v. GOV'T OF MAN. (1985), 35 M.V.R. 13 (Man. Q.B.)  
GERELUS, (1985), 14 W.C.B. 342 (Ont. Dist. Ct.)  
GERMAN (1947), 89 C.C.C. 90, 3 C.R. 516 (Ont. C.A.)  
GERSON (Re) (1946), 3 C.R. 111 (S.C.C.)  
GHANY (1983), 19 M.V.R. 169 (Ont. C.A.)  
GIAGNOCAVO (1975), 32 C.R.N.S. 27 (Ont. S.C.)  
GIBBONS and PROCTOR (1918), 13 Cr. App. R. 135 (Eng. Ct. of Crim. App.)  
GIFFEN, (1980), 8 M.V.R. 313 (N.S. Co. Ct.)  
GIFFIN (1980), 8 M.V.R. 313, 46 N.S.R. (2d) 541, 89 A.P.R. 541 (N.S. Co. Ct.)  
GILBERT (No. 2) (1907), 12 C.C.C. 127 (S.C.C.)  
GILKES, (1978), 8 C.R. (3d) 159 (Ont. Prov. Ct.)  
GILL v. ELWOOD, [1969] 2 O.R. 49 (Co. Ct.) aff'd [1970] 2 O.R. 59 (C.A.)  
GILL v. REGISTRAR OF MOTOR VEHICLES; HEFFREN v. REGISTRAR OF MOTOR VEHICLES (1985), 35 M.V.R. 1, 21 C.C.C. (2d) 234 (Ont. C.A.)  
GILLESPIE, (1967), 51 Cr. App. R. 172 (U.K.C.A.)  
GIRALDI (1975), 28 C.C.C. (2d) 248 (B.C.C.A.)  
GIROUX, (1979), 55 C.C.C. (2d) 375 (Ont. C.A.)  
GLOBOCKI, (1991), 48 M.V.R. (2d) 179 (Ont. Prov. Ct.)  
GLUBISZ (No. 2) (1979), 9 C.R. (3d) 300, 47 C.C.C. (2d) 232 (B.C.C.A.)  
GOACHER, (1974), 18 C.C.C. (2d) 244 (Ont. H.C.)  
GOLDEN (unreported, Ont. Prov. Ct., Jan. 28, 1985, aff'd unreported, Ont. C.A., Jan. 20, 1989)  
GOLDHAR, (1941), 76 C.C.C. 270 (Ont. C.A.)  
GONDER (1981), 62 C.C.C. (2d) 326 (Yukon Terr. Ct.)  
GOODING (1977), 33 N.S.R. (2d) 98, 57 A.P.R. (2d) 98 (N.S. Co. Ct.)  
GORDON, (1983), 4 C.C.C. (3d) 492 (Ont. C.A.)  
GORE MUTUAL INSURANCE CO. v. ROSSIGNOLI, [1964] 2 O.R. 274 (C.A.)  
GOSTICK, (1991), 62 C.C.C. (3d) 276 (Ont. C.A.)  
GOUGEON et al. (1981), 55 C.C.C. (2d) 218 (Ont. C.A.)  
GOULD, (1990), 57 C.C.C. (3d) 500 (B.C.C.A.)  
GOUR (1986), 40 M.V.R. 139 (Ont. C.A.)  
GOVEDAROV et al. (1974), 25 C.R.N.S. 1, 16 C.C.C. (2d) 238 (Ont. C.A.); aff'd 32 C.R.N.S. 54, 25 C.C.C. (2d) 161 (S.C.C.)  
GOWER, (1973), 10 C.C.C. (2d) 543, 21 C.R.N.S. 250 (N.S.Co. Ct.)  
GRAAT (1980), 17 C.R. (3d) 55, 55 C.C.C. (2d) 429 (Ont. C.A.)  
GRABOWSKI AND THOMAS (1983), 8 C.C.C. (3d) 78 (Que. C.A.), aff'd (1985), 22 C.C.C. (3d) 449 (S.C.C.)  
GRAHAM (Oct. 1982), unreported (Ont. S.C.)  
GRAINGER (1958), 120 C.C.C. 321, 28 C.R. 84 (Ont. C.A.)  
GRANT, (1989), 49 C.C.C. (3d) 410 (Man. C.A.)  
GRAY, (1988), 9 M.V.R. (2d) 152 (Man. C.A.)  
GRAY, [1900] 2 Q.B. 86 (C.A.)  
GRAYLEY, (unreported, Ont. Prov. Ct., June 21, 1979, per Carson P.C.J.)  
GREEN (1972), 9 C.C.C. (2d) 289 (N.S.C.A.)  
GREENFIELD, [1954] O.W.N. 292, 18 C.R. 85 (Ont. H.C.)  
GREENSPAN (30 Aug. 1982), unreported (Ont. Prov. Ct.); aff'd (16 Sept. 1982) (Ont. S.C.)  
GREGOIRE (1927), 47 C.C.C. 288 (Ont. C.A.)  
GRICE (1957), 26 C.R. 318 (Ont. S.C.)

GRIFFIN (1955), 63 C.C.C. 286 (N.B.C.A.)  
GRONDKOWSKI and MALINOWSKI, (1946), 31 Cr. App. R. 116 (C.A.)  
GROSS (1973), 9 C.C.C. (2d) 122 (Ont. C.A.)  
GRUSKO, (1981), 11 M.V.R. 239 (Man. C.A.)  
GUERTIN, (1971), 3 C.C.C. (2d) 135 (Ont. Dist. Ct.)  
GUIMOND, [1979] 1 S.C.R. 960, 44 C.C.C. (2d) 481, 8 C.R. (3d) 185 (S.C.C.)  
GUIMONT v. WILLISTON (1980), 30 N.B.R. (2d) 178, 70 A.P.R. 178 (N.B.C.A.)  
GULYAS, (1962), 39 W.W.R. 452 (Alta. Dist. Ct.)  
GUNTER v. REG. of MOTOR VEHICLES FOR N.B. (1984), 33 M.V.R. 38, 59 N.B.R. (2d) 439, 15 D.L.R. (4th) 758, 154 A.P.R. 439 (N.B.Q.B.)  
GUSHUE (1979), 50 C.C.C. (2d) 417, 16 C.R. (3d) 39 (S.C.C.)  
GUSHUE (No. 4) (1975), 30 C.R.N.S. 178 (Ont. Co. Ct.)  
GUSHUE (No. 3) (1975), 30 C.R.N.S. 173 (Ont. Co. Ct.)  
GWOSDOWSKI, (1972), 10 C.C.C. (2d) 434 (Ont. C.A.)  
GWOZDOWSKI (1972), 10 C.C.C. (2d) 434 (Ont. C.A.)  
HAGENLOCKER, (1981), 65 C.C.C. (2d) 101, aff'd 70 C.C.C. (2d) 41 (S.C.C.)  
HALLET, (1988), 8 M.V.R. (2d) 29 (N.S. Co. Ct.)  
HALMO, [1941] O.R. 99 (Ont. C.A.)  
HAMILTON v. HAMILTON, (1920), 27 O.L.R. 359 (H.C.)  
HAMMOND (1978), 1 M.V.R. 210 (Ont. Co. Ct.)  
HAMMOND (1941), 28 Crim. App. R. 84 (Eng. Ct. of Crim. App.)  
HAMMOND v. SMITH (1964), 45 D.L.R. (2d) 762 (N.S. Co. Ct.)  
HANAWAY and LAMAGA (1980), 63 C.C.C. (2d) 44 (Ont. Dist. Ct.)  
HANDY, (1978), 45 C.C.C. (2d) 232 (B.C.C.A.)  
HANEY et al. (1924), 43 C.C.C. 297 (Ont. S.C.)  
HANNAM, (1986), 1 M.V.R. (2d) 361 (Alta. Q.B.)  
HANSARD SPRUCE MILLS LTD., (1954), 13 W.W.R. 285 (B.C.S.C.)  
HANSEN, (1988), 46 C.C.C. (3d) 504 (B.C.C.A.)  
HARDING, [1971] 1 O.R. 699, 2 C.C.C. (2d) 341 (Ont. Co. Ct.)  
HARDY (1983), 22 M.V.R. 239 (B.C.S.C.)  
HARMS, [1967] 3 C.C.C. 93 (Sask. Prov. Ct.)  
HARNISH (Re) (1980), 49 C.C.C. (2d) 190 (N.S.C.A.)  
HARPER (1985) 45 C.R. (3d) 186, 35 M.V.R. 134 (B.C. Co. Ct.)  
HARPER v. ASSOC. NEWSPAPERS LTD. (1927), 43 T.L.R. 331  
HARRINGTON (1977), 3 B.C.L.R. 217 (B.C. Co. Ct.)  
HARRIS v. EDWARD, (1947), 89 C.C.C. 231 (Ont. C.A.)  
HARRIS, [1927] 2 K.B. 587, (1927), 96 L.J.K.B. 1069  
HARRISON (1977), 28 C.C.C. (2d) 279 (S.C.C.)  
HARRISON, v. CARSWELL, [1976] 2 S.C.R. 200, 25 C.C.C. (2d) 186  
HARRISON and ALONZO (1982), 67 C.C.C. (2d) 401 (Alta. C.A.)  
HARTT (1979), 45 C.C.C. (2d), 262 (N.B.C.A.)  
HARVEY (Re) (1957), 119 C.C.C. 124 (Ont. C.A.)  
HATHERLEY (1971), 4 C.C.C. (2d) 242 (Ont. C.A.)  
HATTON (1978), 39 C.C.C. (2d) 282 (Ont. C.A.)  
HAWKSHAW, (1986), 23 C.C.C. (3d) 129, 51 C.R. (3d) 289 (S.C.C.)  
HAYES, (1989), 48 C.C.C. (3d) 161 (S.C.C.)  
HEBERT, (1990), 57 C.C.C. (3d) 1 (S.C.C.)  
HEIDEL, (1986), 27 C.R.R. 63 (Sask. Q.B.)  
HENDERSON (1948), 91 C.C.C. 97, 5 C.R. 112 (S.C.C.)  
HENDRICKS, (1988), 44 C.C.C. (3d) 52 (Sask. Q.B.)  
HENUSET (1983), 20 M.V.R. 1, 20 Man. R. (2d) 330, [1983] 4 W.W.R. 267 (Man. Co. Ct.)

HICKEY (1976), 30 C.C.C. (2d) 416, 13 O.R. (2d) 228, 70 D.L.R. (3d) 689 (Ont. C.A.)  
HIGGINS, (1981), 60 C.C.C. (2d) 247  
HILDEBRAND (1981), 15 M.V.R. 150 (B.C.C.A.)  
HILL, (1986), 32 C.C.C. (3d) 314 (Ont. C.A.)  
HILL, (1976), 33 C.C.C. (2d) 60, 37 C.R.N.S. 377 (S.C.C.)  
HILL, (1976), 33 C.C.C. (2d) 60 (B.C.C.A.)  
HILL, (1973), 14 C.C.C. (2d) 505 (S.C.C.)  
HISEY (1985), 40 M.V.R. 152, 24 C.C.C. (3d) 20 (Ont. C.A.)  
HOBART, (1982), 65 C.C.C. (2d) 518, 25 C.R. (3d) 214 (Ont. C.A.)  
HOBBINS, (1982), 66 C.C.C. (2d) 30 (S.C.C.)  
HODGE'S CASE, [1838] 2 LEWIN 227, 168 E.R. 1136  
HOGAN, (1982), 2 C.C.C. (3d) 557 (Ont. C.A.)  
HOILET, (1991), 4 C.R. (4th) 372 (Ont. C.A.)  
HOLMES, (1988), 41 C.C.C. (3d) 497, 64 C.R. (3d) 97 (S.C.C.)  
HOLMES (1953), 71 C.C.C. 358 (N.S. Co. Ct.)  
HONAN v. GERHOLD, (1974), 50 D.L.R. (3d) 582 (S.C.C.)  
HORBAN, (1956), 31 W.W.R. 139 (Alta. Dist. Ct.)  
HORNCastle (1972), 8 C.C.C. (2d) 253, 19 C.R.N.S. 362 (N.B.C.A.)  
HORNSTEIN (1973), 11 C.C.C. (2d) 197 (Ont. Prov. Ct.)  
HORVATH (1979) 44 C.C.C. 182 (Ont. C.A.)  
HORWITZ, [1964] 2 C.C.C. 394 (Alta. Dist. Ct.)  
HOUNIET, (1985), 21 C.R.R. 175 (B.C. Co. Ct.)  
HOWARD (1966), 9 C.R.L.Q. 105 (N.S. Co. Ct.)  
HOWARTH (1971), 1 C.C.C. (2d) 546, 13 C.R.N.S. 329 (Ont. C.A.)  
HOWE, (unreported, Ont. Prov. Ct., County of Middlesex, Oct. 27, 1988, per Walker P.C.J.)  
HOWLETT (1950), 96 C.C.C. 182, 9 C.R. 196 (Ont. C.A.)  
HUBER (1985), 36 M.V.R. 10 (Ont. C.A.)  
HUDDLESTON, (1984), 28 M.V.R. 37 (Sask. Q.B.)  
HUFISKY, (1988), 40 C.C.C. (3d) 398, 4 M.V.R. (2d) 170 (S.C.C.)  
HUFISKY, [1988] 1 S.C.R. 621, 40 C.C.C. (3d) 398 (S.C.C.)  
HULLAN, [1970] 1 C.C.C. 36, 6 C.R.N.S. 296 (Ont. C.A.)  
HULUSZKIW (1962), 37 C.R. 386 (Ont. C.A.)  
HUME, Ex parte HAWKINS, [1966] 3 C.C.C. 43 (B.C.S.C.)  
HUNT, (1986), 18 O.A.C. 78 (Ont. C.A.)  
HUNT, [1987] A.C. 352 (H.L.)  
HUNTER (1981), 58 C.C.C. (2d) 190 (Ont. C.A.)  
HUNTER AND SOUTHAM, (1984), 14 C.C.C. (3d) 1 (Ont. C.A.)  
HUSBANDS (1973), 24 C.R.N.S. 188 (Ont. Co. Ct.)  
HUSKINS (1960), 32 C.R. 276 (N.S. Mag. Ct.)  
IBRAHIM, [1914] A.C. 599 (P.C.)  
IEVINS, (1969), 11 Crim. L.Q. 334 (Ont. Co. Ct.)  
INGRAM, (1978), 9 B.C.L.R. 195 (B.C.C.A.)  
INTERNATIONAL NICKEL CO. (1972), 8 C.C.C. (2d) 557 (Ont. H.C.J.)  
INUUVIK COASTAL AIRWAYS LTD., (1983), 10 C.C.C. (3d) 89 (N.W.T.S.C.)  
IRELAND, (1990), 1 O.R. (3d) 577 (Gen. Div.)  
IRWIN v. DALLEY, (1951), 118 C.C.C. 116 (Ont. C.A.)  
ISAAC, (1984), 9 C.C.C. (3d) 289 (S.C.C.)  
IWANCHUCK (1928), 50 C.C.C. 405 (Alta C.A.)  
IZZARD (1971), 3 C.C.C. (2d) 270, 14 C.R.N.S. 249 (N.S.S.C.)  
J. (F.E.), (1989), 53 C.C.C. (3d) 64 (Ont. C.A.)  
J.(F.E.), (1990), 53 C.C.C. (3d) 64, 74 C.R. (3d) 269 (Ont. C.A.)



JACK, (1992), 70 C.C.C.(3d) 76 (Man. C.A.)  
 JACK (1983), 21 M.V.R. 198 (B.C.S.C.)  
 JACK, (1981), 17 M.V.R. 77 (Ont. Prov. Ct.)  
 JACKSON and WOODS (1975), 20 C.C.C. (2d) 113 (Ont. H.C.)  
 JACOBSEN (1964), 48 W.W.R. 272, 22 C.R. 24 (B.C.C.A.)  
 JAMES (1984), 28 M.V.R. 26 (B.C. Co. Ct.)  
 JANES (1983), 21 M.V.R. 316 (B.C. Prov. Ct.)  
 JANSEN, (unreported, Ont. Co. Ct., County of Brant, May 24, 1983, per Fanjoy Co. Ct. J.)  
 JARRET, (1975), 25 C.C.C. (2d) 241  
 JARRY, (1991), 65 C.C.C. (3d) 566 (Que. C.A.)  
 JENEI (unreported, Ont. Prov. Ct. Jan. 23, 1989, per Grossi P.C.J.)  
 JEWELL, (1974), 22 C.C.C. (2d) 252 (Ont. C.A.)  
 JEWITT, [1985] 2 S.C.R. 128, 21 C.C.C. (3d) 7  
 JOANISSE, (unreported, Ontario Dist. Ct., Judicial District of Ottawa-Carleton, Feb. 25, 1986, per Mercier D.C.J.)  
 JOHN, (1985), 23 C.C.C. (3d) 326 (S.C.C.)  
 JOHNS (No. 2) (1963), 45 W.W.R. 65 (Sask. Dist. Ct.)  
 JOHNSON (1983), 45 N.B.R. (2d) 371, 118 A.P.R. 371 (N.B.Q.B.)  
 JOHNSON (1920), 34 C.C.C. 98 (Ont. S.C.)  
 JOHNSON (08 Dec., 1976), unreported (Ont. C.A.)  
 JOHNSON v. HILLBORN, [1932] 1 D.L.R. 683, 4 M.P.R. 262 (N.S.C.A.)  
 JOHNSON, [1967] 3 C.C.C. 48 (B.C.C.A.)  
 JOHNSTON, (1992), 69 C.C.C. (3d) 395 (Ont. Gen. Div.)  
 JOHNSTON and TREMAYNE, [1970] 4 C.C.C. 64 (Ont. C.A.)  
 JOHNSTON v. SUPERINTENDANT OF MOTOR VEHICLES, (1987), 46 M.V.R. 59 (B.C.S.C.)  
 JOINER (unreported, Ont. Dist. Ct., Jan. 18, 1989, per LeSage A.C.J.)  
 JOLLY, (1990), 57 C.C.C. (3d) 389 (B.C.C.A.)  
 JONES, (1988), 44 C.C.C. (3d) 248, 66 C.R. (3d) 54 (Ont. C.A.)  
 JONES (1978), 42 C.C.C. (2d) 192 (Ont. C.A.)  
 JONES v. MEEHAN, (1899), 175 U.S. 1 (U.S.S.C.)  
 JONES; SHANNON (1980), 6 M.V.R. 308 (Alta. Prov. Ct.)  
 JORDEN, [1966] 2 C.C.C. 243 (N.B.C.A.)  
 JOSEPHY, [1978] 2 W.W.R. 583 (B.C. Prov. Ct.)  
 JOSLIN (1981), 10 M.V.R. 29, 59 C.C.C. (2d) 512 (Ont. C.A.)  
 JOUTSI (1980), 17 C.R. (3d) 289 (Ont. C.A.)  
 JOY OIL CO., [1959] O.R. 288, 123 C.C.C. 370 (Ont. C.A.)  
 JOYAL, (1990), 55 C.C.C. (3d) 233  
 JURTYN (1958), 121 C.C.C. 403, 28 C.R. 295 (Ont. C.A.)  
 JUSTICE OF THE PEACE, Ex parte PEEL CONSTRUCTION CO. LTD., [1970] 3 O.R. 688, 1 C.C.C. (2d) 1 (Ont. H.C.J.)  
 KAHL, (1971), 4 C.C.C. (2d) 172 (Ont. H.C.)  
 KAPOOR (1989), 52 C.C.C. (3d) 41, 19 M.V.R. (2d) 219 (Ont. H.C.)  
 KARCHESY, ex parte, [1967] 3 C.C.C. 272, aff'd [1968] 4 C.C.C. 128 (S.C.C.)  
 KARTNA, (1979), 2 M.V.R. 259 (Ont. H.C.)  
 KAUFMANN, (1981), 22 C.R. (3d) 274 (Sask. Q.B.)  
 KAVANAGH (1955), 114 C.C.C. 378, 22 C.R. 396 (Ont. C.A.)  
 KAY, (1990), 53 C.C.C. (3d) 500  
 KAYSAYWAYSEMAT, (1992), 10 C.R. (4th) 317 (Sask. C.A.)  
 KAZIA, [1978] 2 W.C.B. 452 (Ont. Dist. Ct.)  
 KEARLEY, [1992] 2 W.L.R. 656 (H.L.)  
 KEARNS (1945), 84 C.C.C. 357 (B.C.C.A.)



KEDDY (1961), 130 C.C.C. 226 (N.S.S.C.A.D.)  
KEEGSTRA, (1990), 1 C.R. (4th) 129 (S.C.C.)  
KEHOE, (1990), 21 M.V.R. (2d) 24 (Ont. Prov. Ct.)  
KEINAPPLE, [1975] 1 S.C.R. 729  
KELLER, (1990), 25 M.V.R. (2d) 7 (Ont. Gen. Div.)  
KELLIHER AND SMITH, [1931] 4 D.L.R. 102 (S.C.C.)  
KELLY, (1973), 15 C.C.C. (2d) 488 (Ont. H.C.)  
KELLY, (1963), 42 C.R. 346 (Alta. Dist. Ct.)  
KELLY, [1970] 2 O.R. 415, 16 C.R.N.S. 72 (Ont. C.A.)  
KENDALL AND McKAY, (1987), 35 C.C.C. (3d) 105 (Ont. C.A.)  
KENNEDY, (1987), 3 M.V.R. (2d) 88 (B.C.C.)  
KENNEDY (1972), 7 C.C.C. (2d) 42, 18 C.R.N.S. 80 (N.S. Co. Ct.)  
KENNEDY (1972), 21 C.R.N.S. 251 (Ont. C.A.)  
KERENKO et al., [1965] 3 C.C.C. 52, 45 C.R. 291 (Man. C.A.)  
KESHANE (1974), 27 C.R.N.S. 331, 20 C.C.C. (2d) 542, leave to appeal to S.C.C. denied *ibid*  
KESTENBERG and McPHERSON (1959), 126 C.C.C. 387, 32 C.R. 1 (Ont. C.A.)  
KESTER, (1981), 58 C.C.C. (2d) 219 (Ont. Co. Ct.), *aff'd* (1982), 66 C.C.C. (2d) 384 (C.A.)  
KEYOWSKI, [1988] 1 S.C.R. 657, 40 C.C.C. (3d) 481  
KHAN, (1990), 59 C.C.C. (3d) 92 (S.C.C.)  
KHAN, (1982), 66 C.C.C. (2d) 32 (Ont. C.A.)  
KHAN v. COLLEGE OF PHYSICIANS AND SURGEONS, (1992), 76 C.C.C. (3d) 10 (Ont. C.A.)  
KIENAPPLE, [1975] 1 S.C.R. 729, 26 C.R.N.S. 1, 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, 1 N.R. 322 (S.C.C.)  
KING, (1991), 108 N.S.R. (2d) 145 (N.S. Co. Ct.)  
KING, (1984), 54 Nfld. & P.E.I.R. 286 (Nfld. Dist. Ct.)  
KING, (1977), 35 C.C.C. (2d) 424 (Ont. Div. Ct.)  
KINNAIRD, (1805), 6 EAST 188 (K.B.)  
KINNIE, (1989), 52 C.C.C. 112 (B.C.C.A.)  
KITSON, (1955), 39 Cr. App. R. 66 (C.C.A.)  
KLINE, (1988), 86 N.S.R. (2d) (2d) 53 (N.S.S.C.T.D.)  
KNUFF, (1980) 52 C.C.C. (2d) 523 (Alta. C.A.)  
KNUTSON, (1989), 13 M.V.R. 42 (Ont. C.A.)  
KOOMANS, (1977), 48 Chitty's L.J. 173 (Ont. H.C.)  
KOOP, [1958] O.W.N. 394 (Ont. C.A.)  
KOPYTO, (1981), 60 C.C.C. (2d) 85, 21 C.R. (3d) 276 (Ont. C.A.)  
KORES, (1970), 15 C.R.N.S. 107 (B.C.C.A.)  
KOUFIS (1941), 76 C.C.C. 161 (S.C.C.)  
KOUROUKLIS (1986), 50 C.R. (3d) 186 (Que. S.C.)  
KOVACEVIC (1951), 99 C.C.C. 258, 11 C.R. 333 (Ont. H.C.)  
KOZODOY (1957), 117 C.C.C. 315 (Ont. C.A.)  
KRAFT v. PREFONTAINE (1963), 41 W.W.R. 510 (Sask. C.A.)  
KRAMER v. FORGRAVE (1989), 68 O.R. (2d) 414 (Ont. H.C.)  
KRAUSE, (1986), 29 C.C.C. (3d) 385 (S.C.C.)  
KRUG, [1985] 2 S.C.R. 255  
KRUGER and MANUEL (1977), 34 C.C.C. (2d) 377, [1977] 4 W.W.R. 300 (S.C.C.)  
KULBACKI, [1966] 1 C.C.C. 167, 47 C.R. 233 (Man. C.A.)  
KULDIP, (1990), 61 C.C.C. (3d) 385 (S.C.C.)  
KURTZMAN (1991), 31 M.V.R. (2d) 1 (Ont. C.A.)  
KUTYNEC, (1992), 70 C.C.C. (3d) 1 (Ont. C.A.)  
LABINE (1976), 23 C.C.C. (2d) 567 (Ont. C.A.)  
LACE (1981), 45 N.S.R. (2d) 466 (N.S. Prov. Ct.)

LACHANCE (1962), 132 C.C.C. 202, 37 C.R. 65 (Man. C.A.)  
 LACHAPELLE, (1977), 38 C.C.C. (2d) 369 (Que. C.A.)  
 LADOUCEUR, [1990] 1 S.C.R. 1257, 56 C.C.C. (3d) 22, 21 M.V.R. (2d) 165  
 LAFARGE CANADA INC. (1989), 19 M.V.R. (2d) 110 (Ont. Prov. Ct.)  
 LAFONTAINE (1979), 9 C.R. (3d) 263 (Que. S.C.)  
 LAFRENTZ, [1970] 2 C.C.C. 381 (Sask. Q.B.)  
 LAGUFF, (1979), 7 M.V.R. 234 (Ont. Prov. Ct.)  
 LAIDLAW TPT. LTD. (1980), 4 M.V.R. 253 (Ont. Co. Ct.)  
 LAINAS, (unreported, Ont. H.C., Sept. 2, 1982, per Steele J.)  
 LAING, (1985), 69 A.R. 81 (Alta. C.A.)  
 LAMBERT, [1967] Crim. L.R. 480 (Eng. Ct. of Crim App.)  
 LAMOUREUX, (1984), 13 C.C.C. (3d) 101 (Que. C.A.)  
 LANE and ROSS (1969), 6 C.R.N.S. 273, [1970] 1 C.C.C. 196 (Ont. S.C.)  
 LANGILLE, (1990), 59 C.C.C. (3d) 544 (Ont. C.A.)  
 LANGILLE (1980), 31 N.B.R. (2d) 355, 75 A.P.R. 355, 7 M.V.R. 294 (N.B.C.A.)  
 LAPLANTE v. COURT OF SESSIONS OF THE PEACE (1938), 69 C.C.C. 291 (Que. Sup. Ct.)  
 LAPOINTE and SICOTTE (1981), 64 C.C.C. (2d) 562 (Ont. G.S.P.)  
 LARUE-LANGLOIS, (1970), 14 C.R.N.S. 68 (Que. C.A.)  
 LATOUR, (1976), 33 C.C.C. (2d) 377 (S.C.C.)  
 LATOUR, [1951] S.C.R. 19, 11 C.R. 1 (S.C.C.)  
 LAURIE (1979), 42 C.C.C. (2d) 311 (N.S.C.A.)  
 LAURIN, (No.5) (1903), 6 C.C.C. 135 (Que. K.B.)  
 LAURIN (No. 5) (1902), 6 C.C.C. 135 (Court of King's Bench, Que.)  
 LAVALLEE, (1990), 55 C.C.C. (3d) 97 (S.C.C.)  
 LAVALLEE, (190), 55 C.C.C. (3d) 97 (S.C.C.)  
 LAVELLE (1958), 29 C.R. 156, 122 C.C.C. 111 (Ont. H.C.)  
 LAVERGE, [1951] O.W.N. 617, 100 C.C.C. 265 (Ont. Dist. Ct.)  
 LAVERTY, (No. 2), (1979), 47 C.C.C. (2d) 60 (Ont. C.A.)  
 LAVIOLETTE AND LUND, (1982), 35 N.P.E.I.R. 524 (P.E.I.S.C.)  
 LAWLESS (1981), 11 M.V.R. 296, 33 Nfld. & P.E.I.R. 436, 93 A.P.R. 436 (P.E.I.S.C.)  
 LAWRENCE, (1990), 59 C.C.C. (3d) 55, 80 C.R. (3d) 289 (Ont. C.A.)  
 LAWRENCE, (1989), 52 C.C.C. (3d) 452 (Ont. C.A.)  
 LAYTON, (1986), 38 C.C.C. (3d) 550 (Ont. Prov. Ct.)  
 LEADBETTER v. WEST SHOE CO., [1944] O.W.N. 238 (C.A.)  
 LEANEY, (1987), 38 C.C.C. (3d) 263 (Alta. C.A.)  
 LEARN (1981), 63 C.C.C. (2d) 191 (Ont. H.C.)  
 LEBEDORF, [1963] 2 C.C.C. 95, [1962] O.W.N. 233 (Ont. H.C.)  
 LEBEL (1982), 30 C.R. (3d) 285, 18 M.V.R. 84, 3 C.R.R. 263 (Que. S.C.)  
 LEBLANC, (1988), 4 M.V.R. (2d) 89 (N.B.Q.B.)  
 LEOEUF, (1979), 57 C.C.C. (2d) 257 (Que. C.A.)  
 LECLAIR, (1989), 67 C.R. (3d) 209, 46 C.C.C. (3d) 129 (S.C.C.)  
 LEE'S POULTRY LTD. (1985), 17 C.C.C. (3d) 539 (Ont. C.A.)  
 LEGACE, (1985), 60 N.B.R. (2d) 48 (N.B.Q.B.)  
 LEGER, (1982), 17 M.V.R. 312 (N.B.Q.B.)  
 LEHANE (1982), 15 M.V.R. 160 (Alta. Q.B.)  
 LEMAY (1952), 102 C.C.C. 1, 14 C.R. 89 (S.C.C.)  
 LEMIEUX (1978), 41 C.C.C. (2d) 33, 3 C.R. (3d) 284 (Que. C.A.)  
 LENOIR, v. RITCHIE, (1979), 3 S.C.R. 575  
 LEONARD (1976), 29 C.C.C. (2d) 252 (Ont. C.A.)  
 LEONARD, Ex parte GRAHAM (1962), 133 C.C.C. 230, 37 C.R. 374 (Alta S.C.)  
 LEROUX v. CO-OPERATORS GENERAL INS. CO., (1991), 4 O.R. (3d) 609 (Ont. C.A.)

LESSARD (1976), 30 C.C.C. (2d) 70, 33 C.R.N.S. 16 (Ont. C.A.)  
LEUNG, (unreported, June 13, 1988, Ont. Prov. Ct., Judicial District of York, per Tinker P.C.J.)  
LINDSAY, (unreported, Ont. H.C., Feb. 15, 1979, per Grange J.)  
LINNERTH, (1957), 119 C.C.C. 395 (Ont. H.C.)  
LIPPE, (1990), 61 C.C.C. (3d) 127 (Ont. C.A.)  
LITTLEJOHN (Re) (1982), 65 C.C.C. (2d) 486, 27 C.R. (3d) 263 (B.C.C.A.)  
LITWIN, (1989), 101 A.R. (Q.B.)  
LIVELY, [1970] 3 C.C.C. 119, 9 C.R.N.S. 128 (N.S. Co. Ct.)  
LIVINGSTONE, (1990), 57 C.C.C. (3d) 449 (B.C.S.C.)  
LIZOTTE (1980), 18 C.R. (3d) 364 (Que. C.A.)  
LIZOTTE (1950), 99 C.C.C. 113, 11 C.R. 357 (S.C.C.)  
LLOYD v. POWELL DUFFRYN STEAMSHIP CO., [1914] A.C. 733  
LOCKHART v. ROBERTS, (1957), 119 C.C.C. 362 (N.B. Mag. Ct.)  
LOCKHART v. PROSSER, (1960), 129 C.C.C. 67 (N.B.C.A.)  
LOCKIE, [1950] O.W.N. 589, [1950] 4 D.L.R. 443, 10 C.R. 477 (Ont. H.C.)  
LOGAN, (1988), 46 C.C.C. (3d) 354 (Ont. C.A.) aff'd on other grounds (1990), 58 C.C.C. (3d) 391 (S.C.C.)  
LONG (unreported, Ont. Gen. Div., Nov. 16, 1990, per German J.)  
LONGAPHY, (1989), 93 N.S.R. (2d) 97 (N.S.C.A.)  
LONGMUIR, (unreported, Ont. C.A. Sept. 8, 1982)  
LOUGHEED VILLIAGE HOLDINGS LIMITED, (1981), 58 C.P.R. (2d) 108 (B.C. Prov. Ct.) aff'd on other grounds, (1981) 59 C.P.R. (2d) 99 (B.C. Co. Ct.)  
LOVETT, (1986), 43 M.V.R. 282 (N.B.Q.B.)  
LOW (Re), [1933] 2 D.L.R. 608, 59 C.C.C. 346 (Ont. C.A.)  
LOWRY et al. (1971), 2 C.C.C. (2d) 39, 13 C.R.N.S. 332 (Man. C.A.)  
LOYER (1978), 40 C.C.C. (2d) 791 (S.C.C.)  
LUCAS, (1983), 6 C.C.C. (3d) 147, 21 M.V.R. 292 (N.S.C.A.)  
LUCIER (1982), 65 C.C.C. (2d) 150 (S.C.C.)  
LUCKI (1955), 17 W.W.R. 446 (Sask. Police Ct.)  
LUTZ (1978), 22 O.R. (2d) 300, 35 C.R.N.S. 331, 44 C.C.C. (2d) 143 (Ont. Prov. Ct.)  
M. (G.W.), (1990), 58 C.C.C. (3d) 349 (Ont. C.A.)  
M. V. L., (1988), 12 M.V.R. (2d) 33 (Alta. Prov. Ct.)  
M.(S.), (1987), 40 C.C.C. (3d) 242 (N.S.C.A.)  
MA, HO AND LI, (1978), 44 C.C.C. (2nd) 537, 6 C.R. (3d) 325 (B.C.C.A.)  
MacADAM, (1976), 22 N.S.R. (2d) 204 (Co. Ct.)  
MacARTHUR, (1987, 76 N.S.R. (2d) 346 (N.S. Co. Ct.)  
MacASKILL (1981), 58 C.C.C. (2d) 361 (N.S.C.A.)  
MacCAULAY (1958), 120 C.C.C. 372 (N.B. Co. Ct.)  
MacDONAGH, [1974] 2 ALL E.R. 257 (C.A.)  
MacDONALD, (1990), 54 C.C.C. (3d) 97  
MacDONALD, (1989), 48 C.C.C. (3d) 230 (N.S.C.A.)  
MacDONALD (1946), 87 C.C.C. 257, 2 C.R. 514 (S.C.C.)  
MacDOUGALL, [1982] 25 C.R. 605, 44 N.R. 560, 1 C.C.C. (3d) 65, 54 N.S.R. (2d) 562, 18 M.V.R. 180, 31 C.R. (3d) 1, 112 A.P.R. 562, 142 D.L.R. (3d) 216 (S.C.C.)  
MacDOUGALL, [1985] 2 S.C.R. 605, 1 C.C.C. (3d) 65, 18 M.V.R. 180  
MACHISKINIC (1985), 41 Sask. R. 311 (Q.B.)  
MacINTYRE, (1989, 22 M.V.R. (2d) 331 (P.E.I. Prov. Ct.)  
MACK, (1988), 44 C.C.C. (3d) 513 (S.C.C.)  
MacKENZIE, (1979), 24 N.P.E.I.R. 363 (P.E.I.S.C.)  
MacLEAN; HILSINGER (1981), 58 C.C.C. (2d) 31 (Ont. C.A.)  
MacLELLAN (1983), 23 M.V.R. 236, 60 N.S.R. (2d) 426, 128 A.P.R. 426 (N.S.C.A.)

MAHONEY (1979), 50 C.C.C. (2d) 380 (Ont. C.A.); *aff'd* (1982), 7 W.C.B. 475 (S.C.C.)  
 MAIDMENT, (1984), 10 C.C.C. (3d) 512, 37 C.R. (C.R. (3d) 381 (N.S.C.A.)  
 MAIER, (1987), 83 A.R. 194 (Prov. Ct.), *rev'd* (1989), 13 M.V.R. (2d) 49 (Q.B.), *rev'd* (1989), 21 M.V.R. (2d) 134 (Alta. C.A.)  
 MAIKA (1974), 27 C.R.N.S 115, 17 C.C.C. (2d) 110 (Ont. C. A.)  
 MAKI v. CORCORAN, [1953] O.W.N. 843 (H.C.)  
 MALLIOS, (1978), 42 C.C.C. (2d) 441 (Que. S.C.)  
 MALONEY, (1982), 15 M.V.R. 121 (N.S.S.C.A.D.)  
 MALONEY (No. 2) (1976), 29 C.C.C. (2d) 431 (Ont. Co. Ct.)  
 MANITOBA PUBLIC INSURANCE CO. v. PAUL, (1985), 35 M.V.R. 153 (Man. Q.B.)  
 MANN, (1990), 23 M.V.R. (2d) 118 (Nfld. S.C.)  
 MANNIEN, (1987), 58 C.R. (3d) 97, 34 C.C.C. (3d) 385 (S.C.C.)  
 MANNION, (1986), 28 C.C.C. (3d) 544 (S.C.C.)  
 MANNION TPT. LTD. (1985), 31 M.V.R. 246, 38 Sask. R. 152 (Sask. Q.B.)  
 MANSFIELD (1982), 50 N.S.R. (2d) 706 (N.S.C.A.)  
 MANSHIP, (1983), 22 M.V.R. 257, 48 M.B.R. (2d) 124 (Q.B.)  
 MANSOUR, [1979] 2 S.C.R. 916, 2 M.V.R. 1, 47 C.C.C. (2d) 129, 101 D.L.R. (3d) 545, 27 N.R. 476 (S.C.C.)  
 MARCEAU (1978), 2 M.V.R. 202 (Que. S.C.)  
 MARK PARK (1920), 34 C.C.C. 203 (Ont. S.C.)  
 MARKADONIS (1935), 63 C.C.C. 122; *aff'd* (1935), 64 C.C.C. 41 (S.C.C.)  
 MARLER, (1972), 17 N.B.R. (2d) 663 (N.B. Co. Ct.)  
 MARSHALL, [1965] 4 C.C.C. 35 (Alta. Dist. Ct.)  
 MARTEL, [1982] 5 W.W.R. 577 (B.C.S.C.)  
 MARTIN, (1985), 19 C.C.C. (3d) 248 (Ont. C.A.)  
 MARTIN (1960), 126 C.C.C. 329 (Ont. H.C.)  
 MASSICK (1985), 35 M.V.R. 234, 47 C.R. (3d) 148, 21 C.C.C. (3d) 128 (B.C.C.A.)  
 MATHEWS, (1987), 70 Nfld. & P.E.I.R. 30 (Nfld. S.C.T.D.)  
 MATHEWS, (1985), 56 Nfld. & P.E.I.R. 67 (Nfld. Dist. Ct.)  
 MATSUBA (1982), 17 M.V.R. 221 (Ont. H.C.)  
 MATTIE v. DELORY (1974), 19 N.S.R. (2d) 451 (N.S.S.C.)  
 MAVES v. GRAND TRUNK PAC. RLWY. CO. (1913), 14 D.L.R. 70 (Alta. S.C.)  
 MAXWELL, (unreported, Ont. Prov. Ct., Jan. 8, 1988, per Payne P.C.J.)  
 McCONNELL, *Re* (1977), 35 C.C.C. (2d) 435 (Sask. C.A.)  
 McCORMICK (1961), 130 C.C.C. 196, 35 C.R. 222 (B.C.C.A.)  
 McDONALD, (1913), 21 C.C.C. 229 (P.E.I.S.C.)  
 McDORMAN (1983), 23 M.V.R. 165 (B.C. Prov. Ct.)  
 McEWAN v. ILES, (1981), 34 O.R. (2d) 325 (Co. Ct.)  
 McFADDEN, (1981), 22 C.R. (3d) 76 (B.C.C.A.)  
 McFERRAN (1983), 24 M.V.R. 303 (B.C.Co. Ct.)  
 McGILVERY (1979), 19 A.R. 447 (Alta. Dist. Ct.)  
 McGILVRAY (01 May 1981), unreported (Ont. S.C.)  
 McINNIS, (1973), 13 C.C.C. (2d) 471 (Ont. C.A.)  
 McIVER, [1965] 2 O.R. 475, 45 C.R. 401, [1965] 4 C.C.C. 182 (Ont. C.A.), *aff'd* [1966] S.C.R. 254, [1966] 2 C.C.C. 289 (S.C.C.)  
 McKAY (1979), 9 C.R. (3d) 378 (Sask. C.A.)  
 McKAY AND BRUNER, (1966), 61 W.W.R. 529  
 McKENZIE, (1986), 32 C.C.C. (3d) 527 (B.C.C.A.)  
 McKENZIE, (1956), 114 C.C.C. 335 (Ont. H.C.J.)  
 McKENZIE v. BERGIN, [1937] O.W.N. 200 (Ont. C.A.)  
 McKENZIE, [1961] O.W.N. 344 (Ont. Dist. Ct.)



McKIBBON (Re) (1981), 61 C.C.C. (2d) 126 (Ont. H.C.J.)  
McKIBBON v. CALDWELL (1949), 97 C.C.C. 128 (Ont. Co. Ct.)  
McKINNON, (1989), 70 C.R. (3d) 10 (Ont. C.A.)  
McLACHLAN and LOCKYER (1980), 17 C.R. (3d) 312, 62 C.C.C. (2d) 188 (Ont. S.C.)  
McLAREN (1981), 10 M.V.R. 42 (Ont. C.A.)  
McLAUGHLIN (1974), 15 C.C.C. (2d) 562, 25 C.R.N.S. 362 (Ont. C.A.)  
McLEAN v. MERCHANTS BANK OF CANADA (1916), 27 D.L.R. 156 (Alta. S.C.)  
McLEOD (1984), 36 C.R. (3d) 378 (N.W.T.S.C.)  
McLEOD, et al. (unreported, April 13, 1982, Ont. C.A.)  
McLEOD, PINNOCK AND FARQUARSON (1983), 6 C.C.C. (3d) 29 (Ont. C.A.), affirmed (1986), 27 C.C.C. (3d) 383 (S.C.C.)  
McMAHON et al. (1889), 18 O.R. 502 (Ont. H.C. Q.B. Div.)  
McMILLAN, (1975), 23 C.C.C. (2d) 160 (Ont. C.A.)  
McNABB (1971), 4 C.C.C. (2d) 316 (Sask. C.A.)  
McNAMARA, (unreported, Ont. Prov. Ct., County of Middlesex, May 23, 1985, per Walker P.C.J.)  
McNAMARA et al. (No. 1) (1981), 56 C.C.C. (2d) 193 (Ont. C.A.)  
McPHEE, (1985), 19 C.C.C. (3d) 345, 37 Alta. L.R. (2d) 115 (Q.B.)  
McQUAKER v. GODDARD, [1940] All E.R. 491  
MEDVEDEW, (1978), 43 C.C.C. (2d) 434 (Man. C.A.)  
MEILKE, [1979] 1 W.W.R. 460 (Alta. Prov. Ct.)  
MELARAGNI, (1992), 76 C.C.C. (3d) 78 (Ont. Gen. Div.)  
MELO, (1986), 29 C.C.C. (3d) 173 (Ont. C.A.)  
MERCHANT, (1990), 25 M.V.R. (2d) 234 (Sask. Q.B.)  
METALLO, (unreported, Ont. Prov. Ct., May 5, 1989, per Harris, P.C.J.)  
METRO NEWS LTD., (1986), 29 C.C.C. (3d) 35, 53 C.R. (3d) 289 (Ont. C.A.)  
METROPOLITAN TORONTO v. BECK, (1990), 23 M.V.R. (2d) 61 (Ont. H.C.)  
MEYER, (unreported, Ont. Prov. Ct., Judicial District of Ottawa-Carleton, Sept. 8, 1984, per Hutton P.C.J.)  
MEZZO, (1986), 27 C.C.C. (3d) 97 (S.C.C.)  
MIDDLEBROOK, MILLER, LAPORTA, (1988), 5 M.V.R. (2d) 236 (Ont. C.A.)  
MILBERG (1987), 35 C.C.C. (3d) 45 (Ont. C.A.), leave to appeal to S.C.C. refused *ibid*  
MILES OF MUSIC LTD., (1989), 48 C.C.C. (3d) 96 (Ont. C.A.)  
MILLAR, (1989), 49 C.C.C. (3d) 193 (Ont. C.A.)  
MILLER, (1991), 68 C.C.C. (3d) 517 (Ont. C.A.)  
MILLER, (1986), 41 M.V.R. 141 (Ont. H.C.), aff'd (1988), 5 M.V.R. (2d) 236 (Ont. C.A.)  
MILLER (1981), 36 N.B.R. (2d) 181, 94 A.P.R. 181 (N.B.Q.B.)  
MILLER, (1973), 10 C.C.C. (2d) 467, 21 C.R.N.S. 211 (Ont. H.C.)  
MILLER v. MIN. OF PENSIONS, [1937] 2 All E.R. 1059 (H. of L.)  
MILLER, [1944] O.W.N. 617, 828 C.C.C. 314 (Ont. Co. Ct.)  
MITCHELL, [1965] 1 C.C.C. 155, 43 C.R. 391 (S.C.C.)  
MODESTE, (1959), 127 C.C.C. 197 (N.W.T.T.C.)  
MODRISKI v. ARNOLD, [1947] O.W.N. 483 (C.A.)  
MOGENSON v. WRIGHT (1962), 39 C.R. 56 (Sask. Dist. Ct.)  
MOGHAL (unreported, Ont. Prov. Ct., Feb. 6, 1986, per Lampkin J.)  
MOHL, (1987), 34 C.C.C. (3d) 435, 56 C.R. (3d) 318 (Sask. C.A.)  
MOLIS (1981), 55 C.C.C. (2d) 558, [1981] 2 S.C.R. 356, 116 D.L.R. (3d) 291, 33 N.R. 41 (S.C.C.)  
MONFILS et al, Re (1971), 4 C.C.C. (2d) 163 (Ont. C.A.)  
MONKHOUSE, (1987), 61 C.R. (3d) 343 (Alta. C.A.)  
MONTANI, (1974), 26 C.R.N.S. 339 (Ont. Prov. Ct.)  
MONTELEONE (28 April, 1982), unreported (Ont. C.A.)  
MOODY (1985), 35 M.V.R. 198 (B.C. Co. Ct.)



MOORE, (1984), 15 C.C.C. (3d) 541 (Ont. C.A.)  
 MOORE, [1988] 1 S.C.R. 1097, 41 C.C.C. (3d) 289  
 MOOS, [1969] 2 O.R. 619, [1969] 4 C.C.C. 173 (Ont. Mag. Ct.)  
 MORABITO (1980), 32 N.B.R. (2d) 590, 78 A.P.R. 590 (N.B.Q.B.)  
 MORAN, (1987), 21 O.A.C. 257, 36 C.C.C. (3d) 225 (Ont. C.A.)  
 MORE, [1963] 3 C.C.C. 289 (S.C.C.)  
 MORGAN et al. (1947), 90 C.C.C. 1, 6 C.R. 16 (Ont. C.A.)  
 MORGENTALER (No. 4) (1973), 14 C.C.C. (2d) 455 (Que. Q.B.)  
 MORGENTALER (No. 2) (1974), 14 C.C.C. (2d) 450 (Que. Q.B.)  
 MORIN, (1988), 66 C.R. (3d) 1 (S.C.R.)  
 MORIN, (1987), 36 C.C.C. (3d) 50 (Ont. C.A.), aff'd (1988), 44 C.C.C. (3d) 193 (S.C.C.)  
 MOROZUK, [1986] 1 S.C.R. 31, 24 C.C.C. (3d) 257  
 MORRIS, (1983), 7 C.C.C. (3d) 97 (S.C.C.)  
 MORRIS, (1981), 61 C.C.C. (2d) 163 (Alta. Q.B.)  
 MORRIS, (1981), 61 C.C.C. (2d) 163 (Alta. Q.B.)  
 MORRIS (1979), 43 C.C.C. (2d) 129, 6 C.R. (3d) 36 (S.C.C.)  
 MORRIS, (1971), 56 Cr. App. R. 175 (C.A.)  
 MORRISON AND McKAY, (1979), 31 N.S.R. (2d) 195 (N.S.C.A.)  
 MORTIMER v. McCALLAN, (1840), 157 E.R. 320 (K.B.)  
 MORTON, (1970), 12 C.R.N.S. 76 (B.C. Prov. Ct.)  
 MUDRYK, (1977), 38 C.C.C. (2d) 259, 1 C.R. (3d) 160 (Alta. C.A.) aff'd [1978] 1 S.C.R. 97  
 MULLIGAN, WILLIAM THOMAS (Re) (1971), 15 C.R.N.S. 382 (Ont. S.C.)  
 MULLIGAN [1955] O.R. 240, 20 C.R. 269 (Ont. C.A.)  
 MULTIPLE ACCESS v. McCUTCHEON, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1 (S.C.C.)  
 MUNRO, (unreported, Ont. Prov. Div., Jan 25, 1991, per Nadelle P.C.J.)  
 MURPHY, (1983), 42 N.P.E.I.R. 175 (Nfld. Dist. Ct.)  
 MURPHY (1972) 8 C.C.C. (2d) 313 (Ont. Prov. Ct.)  
 MUTUAL LIFE INS. v. HILLMON, 145 U.S. 285 (1892)  
 NAMINK (1979), 27 Chitty's L.J. 289 (Ont. Co. Ct.)  
 NARAINDEEN, (1990), 80 C.R. (3d) 86, 75 O.R. (3d) 120 (Ont. C.A.)  
 NAUGLER (1981), 65 C.C.C. (2d) 25, 25 C.R. (3d) 392, 14 M.V.R. 9, 49 N.S.R. (2d) 677, 96 A.P.R. 677 (N.S.C.A.)  
 NEALE, (1986), 28 C.C.C. (3d) 345, 43 M.V.R. 194 (Alta. C.A.), rev'g (1985), 34 M.V.R. 245 (Q.B.)  
 NEELY, R. ex rel. v. TAIT, [1965] 1 C.C.C. 16 (N.B. Co. Ct.)  
 NEVILLE, (1980), 31 N.B.R. (2d) 171 (N.B.C.A.), aff'd (1981), 62 C.C.C. (2d) 1 (S.C.C.)  
 NICHOLAS, (1970), 2 C.C.C. (2d) 46 (Ont. H.C.)  
 NICHOLAS v. PENNY, [1950] 2 K.B. 466 (C.A.)  
 NICHOLSON, (1984), 12 C.C.C. (3d) 228 (Alta. C.A.)  
 NIPPI (1969), 70 W.W.R. 390 (Sask. Dist. Ct.)  
 NOSKIYE, (1986), 69 A.R. 186 (C.A.)  
 NYE & LOAN (1978), 66 Crim. App. R. 252 (Eng. C.A.)  
 O'BRIEN, (1987), 7 M.V.R. (2d) 137 (Nfld. S.C.)  
 O'BRIEN (1977), 35 C.C.C. (2d) 209, 38 C.R.N.S. 325 (S.C.C.)  
 O'CALLAGHAN (1982), 65 C.C.C. (2d) 459 (Ont. S.C.)  
 O'DONNELL (1936), 65 C.C.C. 299 (Ont. C.A.)  
 O'GRADY v. SPARLING, [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. 360, 24 D.L.R. (2d) 145 (S.C.C.)  
 O'NEILL and ACKERS (1950), 34 Cr. App. R. 108 (Eng. Ct. of Crim. App.)  
 O'REILLY (1979), 10 Alta. L.R. (2d) 199, 3 M.V.R. 228, 16 A.R. 369 (Alta. Dist. Ct.)  
 OAKES (1983), 2 C.C.C. (3d) 339, 32 C.R. (3d) 193 (Ont. C.A.); aff'd, (1986), 24 C.C.C. (3d) 321, 50 C.R. (3d) 1 (S.C.C.)  
 OAKLEY, (1986), 24 C.C.C. (3d) 351 (Ont. C.A.)

OBERLANDER (1910), 15 B.C.R. 1314, 16 C.C.C. 244 (B.C.S.C.)  
OJA v. NAHAL, (1989), 18 A.C.W.S. (3d) 251 (B.C.C.A.)  
OKANEE (1981), 59 C.C.C. (2d) 149 (Sask. C.A.)  
OLIN, (1978), 48 C.C.C. (2d) 248 (Alta. Q.B.)  
ONTARIO SECURITIES COMMISSION AND CROWNBRIDGE INDUSTRIES INC. (Re) (1989), 70 O.R. (2d) 506 (C.A.)  
OPALCHUK, (1958), 122 C.C.C. 85 (Ont. Co. Ct.)  
OREL (1944), 82 C.C.C. 35 (Sask. C.A.)  
OSBORNE (1976), 25 C.C.C. (2d) 405 (N.B.C.A.)  
OSTROWSKI, (1958), 122 C.C.C. 196 (Ont. H.C.)  
OUSELEY, (1973), 10 C.C.C. (2d) 148 (Ont. C.A.)  
OWOSU, (unreported, Ont. Prov. Ct., Judicial District of York, Aug. 18, 1986, per Babe P.C.J.)  
P.(M.B.), (1992), 72 C.C.C. (3d) 121 (Ont. C.A.)  
P.(R.), (1990), 58 C.C.C. (3d) 334 (Ont. H.C.)  
P.R.S., (1987), 38 C.C.C. (3d) 109, 69 C.R. (3d) 159 (Ont. H.C.)  
PACZIER (1956), 117 C.C.C. 310 (Ont. C.A.)  
PAGANELLI v. ONTARIO, (1987), 6 M.V.R. (2d) 252 (Ont. Div. Ct.)  
PALL (unreported, Ont. Prov. Ct., Sept. 15, 1986, per Harris P.C.J.)  
PALMER and PALMER (1980), 50 C.C.C. (2d) 193, 14 C.R. (3d) 22 (S.C.C.)  
PAOLERICO, (unreported, Ont. Prov. Ct., Judicial District of York, January 29, 1988, per Harris P. C. J.)  
PAPPAJOHN (1980), 52 C.C.C. (2d) 481, 14 C.R. (3d) 243 (S.C.C.)  
PAPPAJOHN, [1979] 5 C.C.C. 193 (B.C.C.A.)  
PARK (1981), 59 C.C.C. (2d) 385, 21 C.R. (3d) 182 (S.C.C.)  
PARK HOTEL (SUDBURY) LTD., [1966] 4 C.C.C. 158 (Ont. Dist. Ct.)  
PARKER, (1985), 10 O.A.C. 156 (Ont. C.A.)  
PARRINGTON, (1985), 20 C.C.C. (3d) 184 (Ont. C.A.)  
PARSONS, (1981), 11 M.V.R. 39 (N.S. Co. Ct.)  
PARSONS v. PROCYSHEN (1962), 39 C.R. 52 (Sask. Dist. Ct.)  
PARTON (1983), 25 M.V.R. 177, 9 C.C.C. (3d) 295, 50 A.R. 233 (Alta. Q.B.)  
PATRICK (1955), 16 W.W.R. 23 (Sask. Dist. Ct.)  
PATRICK, [1960] O.W.N. 206, 32 C.R. 388 (Ont. C.A.)  
PATTERSON, [1964] 1 O.R. 628 (Ont. Mag. Ct.)  
PAUL (1980), 30 N.B.R. (2d) 449, 54 C.C.C. (2d) 506 (N.B.C.A.)  
PAUL (1976), 27 C.C.C. (2d) 1, 33 C.R.N.S. 328 (S.C.C.)  
PAUL (1973), 12 C.C.C. (2d) 497 (N.S. Co. Ct.)  
PAUL MAGDER FURS LTD. (1989), 69 O.R. (2d) 172 (C.A.)  
PAUL and COPAGE (1977), 24 N.S.R. (2d) 313 (N.S.C.A.)  
PAVEL, (1989), 53 C.C.C. (3d) 296, 74 C.R. (3d) 195, 19 M.V.R. (2d) 294  
PEACOCK, [1954] O.W.N. 169, 108 C.C.C. 129, 18 C.R. 95 (Ont. H.C.)  
PEACOCK, [1968] 1 O.R. 698, 3 C.R.N.S. 103 (Ont. Co. Ct.)  
PEARCE (1987), 52 Man. R. (2d) 202 (Man Q.B.)  
PEARSALL (1977), 37 C.C.C. (2d) 414, [1978] 5 W.W.R. 298 (Sask. C.A.)  
PEARSON (1960), 32 W.W.R. 457 (Sask. Mag. Ct.)  
PELLERIN, (1989), 10 M.V.R. (2d) 165, 67 C.R. (3d) 305 (Ont. C.A.)  
PELLETIER (1978), 38 C.C.C. (2d) 515 (Ont. C.A.)  
PENASSE and McLEOD (1971), 8 C.C.C. (2d) 569 (Ont. Prov. Ct.)  
PENCHARD (1936), 65 C.C.C. 113 (N.S.S.C.A.D.)  
PENNO, (1977), 35 C.C.C. (2d) 266 (B.C.C.A.)  
PENNY, (1967), 3 C.R.N.S. 13 (Ont. Co. Ct.)  
PENTILUK and MacDONALD (1975), 28 C.R.N.S. 324, 21 C.C.C. (2d) 87 (Ont. C.A.)

PEPIN, (1974), 20 C.C.C. (2d) 531 (Que. S.C.)  
 PEREIRA, (unreported, Ontario C.A., Sept. 22, 1983)  
 PERKA, (1984), 14 C.C.C. (3d) 385 (S.C.C.)  
 PERKA, [1984] 2 S.C.R. 233, 14 C.C.C. (3d) 385  
 PERRAULT (1982), 65 C.C.C. (2d) 279 (Sask. C.A.)  
 PERREAULT (1941), 78 C.C.C. 236 (Que. Sup. Ct.)  
 PERRY, (1972), 6 C.C.C. (2d) 481 (Ont. Co. Ct.)  
 PERRY (1948), 77 C.C.C. 103 (N.B. Co. Ct.)  
 PERRY and FRANKS (1977), 36 C.C.C. (2d) 209 (Ont. C.A.)  
 PESTELL, (1976), 31 C.C.C. (2d) 436 (Ont. H.C.)  
 PETERBOROUGH (CITY) v. LOCKYER, (1992), 12 O.R. (3d) 214 (Ont. Prov. Div.)  
 PETERS, Re (1982), 63 C.C.C. (2d) 106 (Sask. Q.B.)  
 PETERSEN, (1983), 45 N.B.R. (2d) 271 (N.B.C.A.)  
 PETERSON, (1987), 80 N.B.R. (2d) 324 (N.B.Q.B.)  
 PICHE, [1970] 4 C.C.C. 27, 12 C.R.N.S. 222 (S.C.C.)  
 PLESNIK, (1983), 26 M.V.R. 69 (Ont. Prov. Ct.)  
 PLUARD v. SHELDON, [1951] O.R. 761 (C.A.)  
 POOTLASS, (1977), 1 C.R. (3d) 378 (B.C. Prov. Ct.)  
 POPE et al. (1979), 45 C.C.C. (2d) 348 (B.C. Co. Ct.)  
 PORTER (1977), 33 C.C.C. (2d) 215 (Ont. C.A.)  
 POTAPCHUK, [1963] 1 O.R. 40 (Ont. H.C.)  
 POTTER (1982), 17 M.V.R. 54 (Ont. H.C.)  
 POTTS (1982), 66 C.C.C. (2d) 219, 26 C.R. (3d) 252 (Ont. C.A.)  
 POTVIN (1972), 16 C.R.N.S. 233 (Que. C.A.)  
 POWER, (1987), 67 N.P.E.I.R. 272 (Nfld. S.C.T.D.)  
 PRAIRIE SCHOONER NEWS LTD., (1970), 1 C.C.C. (2d) 251 (Man. C.A.)  
 PREEPER (1984), 28 M.V.R. 193 (B.C. Prov. Ct.)  
 PRESTON (1949), 93 C.C.C. 81, 7 C.R. 72 (S.C.C.)  
 PRIEST, [1961] O.W.N. 166, 35 C.R. 32 (Ont. C.A.)  
 PRINCE, (1986), 30 C.C.C. (3d) 35, 54 C.R. (3d) 97 (S.C.C.)  
 PROCUREUR GENERAL v. TREMBLAY, (1980), 7 M.V.R. 196 (Que. C.A.)  
 PROTECTION DE LA JEUNESSE-449, [1990] R.J.Q. 2367 (C.Q.)  
 PROUDMAN v. DAYMAN (1941), 67 C.L.R. 536 (Aust. H.C.)  
 PRUE; BARIL (1979), 8 C.R. (3d) 68, 46 C.C.C. (2d) 257 (S.C.C.)  
 PSOVSKY, [1988] 4 W.W.R. 471 (Sask. Q.B.)  
 PURDY, (1963), 6 Crim. L.Q. 510 (N.S. Co. Ct.)  
 QUEENSWAY MOTORS LTD., (1986), 47 M.V.R. 144 (Ont. Prov. Ct.)  
 QUERCIA, (1990), 60 C.C.C. (3d) 380 (Ont. C.A.)  
 QUINN (1976), 27 C.C.C. (2d) 543 (Alta. S.C.)  
 QUIRING and KUIPERS (1975), 19 C.C.C. (2d) 337, 27 C.R.N.S. 367 (Sask. C.A.)  
 R. (S.), (1992), 73 C.C.C. (3d) 225, 15 C.R. (4th) 102 (Ont. C.A.)  
 R.I.C., Re (1986), 32 C.C.C. (3d) 399 (Ont. C.A.)  
 RABEY, (1977) 37 C.C.C. (2d) 461 (Ont. C.A.) aff'd (1980), 54 C.C.C. (2d) 1 (S.C.C.)  
 RACCO (No. 1) (1975), 29 C.R.N.S. 303, 23 C.C.C. (2d) 201 (Ont. Co. Ct.)  
 RACIMORE (1975), 25 C.C.C. (2d) 143 (Ont. H.C.)  
 RADFORD CONSTRUCTION LTD. (1980), 6 M.V.R. 295 (Ont. Co. Ct.)  
 RAFAEL (1972), 7 C.C.C. (2d) 325 (Ont. C.A.)  
 RAFFERTY (1984), 6 C.C.C. (3d) 72 (Alta. C.A.)  
 RATTEN, [1971] 3 All E.R. 801, 56 Crim. App. R. 18 (P.C.)  
 Re R. and THIBODEAU, 91964, 7 Crim. L.R. 498 (Ont. H.C.J.)  
 RE R. and K. (1986), 22 C.R.R. 292 (Ont. Prov. Ct.)



REDEKOP BUILDERS (PORT COLBOURNE) LTD., (1972), 12 C.C.C. (2d) 470 (Ont. Co. Ct.)  
REDLICK (1978), 41 C.C.C. (2d) 358, 2 C.R. (3d) 380 (Ont. H.C.J.)  
REDMOND, (1990), 54 C.C.C. (3d) 273 (Ont. C.A.)  
REFERENCE RE ALBERTA LEGISLATION, [1930] S.C.R. 100 (S.C.C.)  
REFERENCE RE SECTION 94(2) OF THE MOTOR VEHICLE ACT (B.C.) (1985), 23 C.C.C. (3d) 289, 48 C.R. (3d) 290, 36 M.V.R. 240 (S.C.C.)  
REHN TRUCKING (1981), 11 M.V.R. 315 (Alta. Q.B.)  
REIBEN (Re) (1920), 30 C.C.C. 271 (Sask. K.B.)  
REID v. WATKINS, [1964] 2 O.R. 248 (Ont. H.C.J.)  
REMILLARD (1921), 35 C.C.C. 227 (S.C.C.)  
RENDALL (1974), 21 C.C.C. (2d) 253 (Ont. Dist. Ct.)  
RHEAUME, (1987), 18 Q.A.C. 161  
RICE v. SOCKETT (1912), 8 D.L.R. 84 (Ont. Div. Ct.)  
RICHARD, (1983), 7 C.C.C. (3d) 579 (Ont. C.A.)  
RICHARD, (1979), 14 C.R. (3d) 165 (Que. Sup. Ct.)  
RIDDLE (1980), 48 C.C.C. (2d) 305 (S.C.C.)  
RIESWYK, (1978), 1 M.V.R. 177 (N.S. Co. Ct.)  
RIMMER (1969), 7 C.R.N.S. 361 (B.C.C.A.)  
RIO ALGOM LTD., (1988), 46 C.C.C. (3d) 242, 66 O.R. (2d) 674 (Ont. C.A.)  
RIOPEL, (1922), 39 C.C.C. 148 (Que. C.A.)  
RISBY (1976), 32 C.C.C. (2d) 242 (B.C.C.A.); aff'd (1978) 39 C.C.C. (2d) 576, [1978] 2 S.C.R. 139 (S.C.C.)  
ROBAR (1980), 56 C.C.C. (2d) 65 (N.S.C.A.); aff'd (1982), 68 C.C.C. (2d) 448 (S.C.C.)  
ROBBINS, (1990), 22 M.V.R. 201 (B.C. Co. Ct.)  
ROBERTS (1981), 18 C.R. (3d) 191 (Ont. C.A.)  
ROBERTS, [1965] 1 Q.B. 85 (C.A.)  
ROBERTS, [1965] 1 Q.B. 85 (C.C.A.)  
ROBERTSON, (1987), 33 C.C.C. (3d) 481 (S.C.C.)  
ROBERTSON (1984), 30 M.V.R. 248, 43 C.R. (3d) 39 (Ont. Prov. Ct.)  
ROBERTSON (1975), 21 C.C.C. (2d) 385, 29 C.R.N.S. 141 (Ont. C.A.)  
ROBILLARD (1978), 41 C.C.C. (2d) 1, 5 C.R. (3d) 186 (S.C.C.)  
ROBSON (1985), 45 C.R. (3d) 68, 31 M.V.R. 220 (B.C.C.A.)  
ROCHE, (1985), 20 C.C.C. (3d) 524, 46 C.R. (3d) 160 (Ont. C.A.)  
ROCHE, (1934), 62 C.C.C. 11 (N.S.S.C.A.D.)  
ROCHESTER, (1984), 13 C.C.C. (3d) 215 (Ont. G.S.P.)  
RODYCH, (1978), 41 C.C.C. (2d) 416 (B.C.)  
ROGERS (1981), 34 N.B.R. (2d) 353, 85 A.P.R. 357 (N.B.Q.B.)  
ROHER, (unreported, Ont. Prov. Ct., May 17, 1985, per Grant J.)  
ROOKE and DEVRIES, (1990), 56 C.C.C. (3d) 220, 77 C.R. (3d) 397 (S.C.C.)  
ROSENTRETER v. FUERST et al., [1957] O.W.N. 458, 10 D.L.R. (2d) 521 (Ont. H.C.)  
ROSS (1985), 32 M.V.R. 261 (B.C.S.C.)  
ROSS (1949), 94 C.C.C. 150, 8 C.R. 218 (Ont. C.A.)  
ROSS, (unreported, Ont. Co. Ct., Jan. 10, 1980, per Cartwright Co. Ct. J.)  
ROSS v. REGISTRAR OF MOTOR VEHICLES FOR ONTARIO (1973), 23 C.R.N.S. 319, 14 C.C.C. (2d) 322 (S.C.C.)  
ROSS, [1966] 2 O.R. 273, [1966] 4 C.C.C. 175 (Ont. C.A.)  
ROSS, [1989] 1 S.C.R. 3, 46 C.C.C. (3d) 129  
ROUSE and McINROY (1977), 36 C.C.C. (2d) 257, 30 C.R.N.S. 135 (B.C.C.A.); aff'd (1978), 42 C.C.C. (2d) 481 (S.C.C.)  
ROWBOTHAM, (1988), 41 C.C.C. (3d) 6 (Ont. C.A.)  
ROWLAND (1984), 13 C.C.C. (3d) 367, 28 M.V.R. 239, 33 Alta. L.R. (2d) 252, 56 A.R. 10, 10 D.L.R.

(4th) 724 (Alta. Q.B.)  
 ROYAL CANADIAN LEGION, [1971] 3 O.R. 522, 4 C.C.C. (2d) 196 (Ont. C.A.)  
 ROYAL BANK v. NEHER, [1985] 5 W.W.R. 667 (Alta. Q.B.)  
 ROYKA (1980), 52 C.C.C. (2d) 368 (Ont. C.A.)  
 RUBENSTEIN, (1987), 41 C.C.C. (3d) 91 (Ont. C.A.)  
 RUBY, (1983), 43 O.R. (2d) 277 (Ont. Surr. Ct.)  
 RUDDICK, (1980), 57 C.C.C. (2d) 421 (Ont. C.A.)  
 RUPTASH (1982), 68 C.C.C. (2d) 182 (Alta C.A.)  
 RUSSO, v. ONTARIO JOCKEY CLUB, (1987), 62 O.R. (2d) 731 (Ont. H.C.J.)  
 RUTHERFORD (1990), 75 C.R. (3d) 230, 38 O.A.C. 41 (Ont. C.A.)  
 RYAN, (1993), 80 C.C.C. (3d) 514 (B.C.C.A.)  
 RYBANSKY et al. (1982), 26 C.R. (3d) 91, 66 C.C.C. (2d) 459 (Ont. S.C.)  
 SALMON (1972), 10 C.C.C. (2d) 289 (Ont. C.A.)  
 SALTEL, (1986), 43 Man. R. (2d) 75, 42 M.V.R. 251 (Q.B.)  
 SALUTIN (1980), 11 C.R. (3d) 284 (Ont. C.A.)  
 SANDMOEN, (1986), 43 M.V.R. 255 (Ont. Dist. Ct.)  
 SANG, [1980] A.C. 402 (H.L.)  
 SANGHA (1984), 29 M.V.R. 28 (B.C. Co. Ct.)  
 SANTERAMO (1976), 32 C.C.C. (2d) 35 (Ont. C.A.)  
 SAULT STE. MARIE (CORP. OF CITY OF) (1976), 30 C.C.C. (2d) 257, 70 D.L.R. (3d) 430; aff'd [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353, (S.C.C.)  
 SAVION AND MIZRAHI, (1980), 52 C.C.C. (2d) 276 (Ont. C.A.)  
 SAYCELL v. BOOL, [1948] 2 ALL E.R. 83 (Div. Ct.)  
 SCARDINO, (1991), 6 c.r. (4th) 146 (Ont. C.A.)  
 SCHANTZ, (1983), 34 C.R. (3d) 370 (Ont. Co. Ct.)  
 SCHATZ, (1988), 45 C.C.C. (3d) 97 (S.C.C.)  
 SCHEEL (1979), 42 C.C.C.C (2d) 31, 3 C.R. (3d) 359 (Ont. C.A.)  
 SCHMIDT, (1948), 92 C.C.C. 53 (S.C.C.)  
 SCHOEMAKER (1979), 2 M.V.R. 27 (Ont. Co. Ct.)  
 SCHWARTZ, (1988), 45 C.C.C. (3d) 97 (S.C.C.)  
 SCOTT, (1991), 61 C.C.C. (3d) 300 (S.C.C.)  
 SEABOYER, (1991), 66 C.C.C. (3d) 321 (S.C.C.)  
 SEAMANS, (1978), 41 C.C.C. (2d) 446 (N.B.C.A.)  
 SEARS (1947), 90 C.C.C. 159, 5 C.R. 1 (Ont. C.A.)  
 SELHI, (1985), 18 C.C.C. (3d) 131 (Sask. C.A.), aff'd (1990), 53 C.C.C. (3d) 576 (S.C.C.)  
 SELLARS (1980), 52 C.C.C. (2d) 345 (S.C.C.)  
 SENGRA, (1988), 8 M.V.R. 231 (B.C.S.C.)  
 SEO, (1986), 25 C.C.C. (3d) 385, 38 M.V.R. 161 (Ont. C.A.)  
 SERVACAR LTD. (1983), 25 M.V.R. 83, 1 O.A.C. 95 (Ont. C.A.)  
 SETAK COMPUTER SERVICES INC. v. BURROUGHS BUSINESS MACHINES LTD., (1977), 15 O.R. (2d) (Ont. H.C.)  
 SETTLE, (1987), 80 N.S.R. (2d) 274 (N.S. Co. Ct.)  
 SHANOWER, (1972), 8 C.C.C. (2d) 527 (Ont. C.A.)  
 SHAWINIGAN ENGINEERING CO. v. NAUD, [1929] S.C.R. 341 (S.C.C.)  
 SHERMAN, (1971), 5 C.C.C. (2d) 247 (Ont. C.A.)  
 SHIER, (unreported, Ont. H.C., Nov. 17, 1989, per Hughes J.)  
 SHIMMEL v. FISHER, [1951] 2 ALL E.R. 672 (Div. Ct.)  
 SHORTREED, (1990), 54 C.C.C. (3d) 292 (Ont. C.A.)  
 SHULER (1983), 21 M.V.R. 189, 26 Alta. L.R. (2d) 270, 46 A.R. 96 (Alta. C.A.)  
 SHUMIATCHER, Q.C., Re MORRIS C. (1968), 64 W.W.R. 743 (Sask. C.A.)  
 SILVERLOCK, [1894] 2 Q.B. 766 (C.A.)



SILVESTRO, (1964), 45 C.R. 76 (S.C.C.)  
SIM (1954), 108 C.C.C. 380, 18 C.R. 100 (Alta. S.C.)  
SIM, (unreported, Ont. C.A., Oct. 11, 1988, per Robbins, Krever and Griffiths J.J.A.)  
SIMARD, (1978), 43 C.C.C. (2d) 474 (Que. C.A.)  
SIMMONDS et al. [1967] 2 All E.R. 399 (C.A.)  
SIMONEAU (1951), 102 C.C.C. 282 (Ont. Dist. Ct.)  
SIMONS, (1991), 68 C.C.C. (3d) 97 (Alta. Q.B.)  
SIOUI, [1990] 1 S.C.R. 1025, 56 C.C.C. (3d) 225  
SKED v. HENRY (1991), 28 M.V.R. (2d) 234 (Ont. Gen. Div.)  
SKIPPEN, [1970] 1 C.C.C. 230 (Ont. C.A.)  
SKOLNICK, [1982] 2 S.C.R. 46, 16 M.V.R. 35, 29 C.R. (3d) 143, 68 C.C.C. (2d) 385 (S.C.C.)  
SKORPUT, (1992), 72 C.C.C. (3d) 294 (Ont. C.A.)  
SKOWRONNEK (1980), 9 M.V.R. 36 (Sask. Dist. Ct.)  
SKWARCHUK (1943), 78 C.C.C. 383 (Sask. Dist. Ct.)  
SLEGG, (1974), 17 C.C.C. (2d) 149 (B.C. Prov. Ct.)  
SLOPEK, (1974), 21 C.C.C. (2D) 362 (Ont. C.A.)  
SLOVACK, [1980] 1 W.W.R.  
SMART AND YOUNG, (1931), 55 C.C.C. 310 (Ont. C.A.)  
SMERCHANSKI et al. (Re) (1979), 46 C.C.C. (2d) 54 (Man. Q.B.)  
SMIERCIAK, (1946), 87 C.C.C. 175 (Ont. C.A.)  
SMITH, (1989), 52 C.C.C. (3d) 90 (Ont. C.A.)  
SMITH, (1988), 43 C.C.C. (3d) 379, 29 B.C.L.R. (C.A.)  
SMITH, (1986), 71 N.S.R. (2d) 229 (C.A.)  
SMITH, (1982), 15 M.V.R. 161, 51 N.S.R. (2d) 539 (N.S.C.A.)  
SMITH (1952), 103 C.C.C. 58, 14 C.R. 304 (Ont. C.A.)  
SMITH (1942), 78 C.C.C. 48 (Ont. C.A.)  
SMITH (Re) (1975), 22 C.C.C. (2d) 268 (B.C.S.C.)  
SMITH, (unreported, S.C.C., August 27, 1992 )  
SMITH, Re (1978), 39 C.C.C. (2d) 229 (Sask. C.A.)  
SMITH, [1971] 5 W.W.R. 674 (Sask. Dist. Ct.)  
SMITHERS (1976), 9 O.R. (2d) 127, 24 C.C.C. (2d) 273 (Ont. C.A.)  
SNELLING, [1952] O.W.N. 214 (Ont. H.C.J.)  
SNODGRASS, (1980), 32 N.B.R. (2d) 583 (N.B.Q.B.)  
SODE (1975), 22 C.C.C. (2d) 329 (N.S.C.A.)  
SOMERS, (1963), 48 App. R. 11 (C.C.A.)  
SOPHONOW, (1986), 50 C.R. (3d) 193 (Man. C.A.)  
SORTINO (1981), 60 C.C.C. (2d) 166 (Ont. C.A.)  
SOUTHAM INC. v COULTER (1990), 60 C.C.C. (3d) 267 (Ont. C.A.)  
SOUTHWICK, Ex parte Gilbert Steel Ltd., [1968] 1 C.C.C. 356 (Ont. C.A.)  
SPACEMAKER PRODUCTS LTD. (1980), 7 M.V.R. 265 (Ont. Co. Ct.)  
SPARRE, (1977), 37 C.C.C. (2d) 495 (Ont. G.S.P.)  
SPARROW (1979), 51 C.C.C. (2d) 443 (Ont. C.A.)  
SPATARO (1971), 4 C.C.C. (2d) 215 (Ont. C.A.); aff'd (1972), 7 C.C.C. (2d) 1 (S.C.C.)  
SPEAR CHIEF (1963), 45 W.W.R. 161 (Alta. Dist. Ct.)  
SPEID (1984), 8 C.C.C. (3d) 18, 37 C.R. (3d) 220 (Ont. C.A.)  
SPENCER (1973), 16 C.C.C. (2d) 29, 27 C.R.N.S. 97 (N.S.C.A.)  
SPIERS, (unreported, Ont. Prov. Ct., Judicial District of York Region, Feb. 7, 1985, per Zimmerman P.C.J.)  
SPORT (1971), 3 C.C.C. (2d) 477 (B.C. Co. Ct.)  
STANDEVEN (1973), 10 C.C.C. (2d) 433 (Ont. H.C.)  
STARK (1927), 47 C.C.C. 356 (Ont. C.A.)

STARR et al., [1965] 3 C.C.C. 138, 45 C.R. 260 (Man. Q.B.)  
 STEAM TANKER "EVGENIA CHANDRIS" , (1976), 27 C.C.C. (2d) 241 (S.C.C.)  
 STEDELBAUER (1975), 19 C.C.C. (2d) 359 (Alta. C.A.)  
 STEEL BROS. CANADA LTD., (1986) 34 L.C.R. 210 (Fed. T.D.)  
 STEER, (1982), 17 M.V.R. 217 (B.C. Prov. Ct.)  
 STEIN, (1928), 50 C.C.C. 311 (S.C.C.)  
 STEINBERG (1931), 56 C.C.C. 9 (S.C.C.)  
 STEPHENS, [1960] O.W.N. 63 (Ont. Co. Ct.)  
 STEVEN v. LeBLANC'S WELDING AND FABRICATING LTD., (1982), 40 N.B.R. (2d) 389 (N.B.C.A.)  
 STEVENSON, (1990), 58 C.C.C.(3d) 464 (Ont. C.A.)  
 STEVENSON v. DANDY, [1920] 2 W.W.R. 643 (Alta. S.C.A.D.)  
 STEWART, (1991), 62 C.C.C. (3d) 289 (Ont. C.A.)  
 STEWART (1976), 31 C.C.C. (2d) 497 (S.C.C.)  
 STINCHCOMBE, (1991), 68 C.C.C. (3d) 1 (S.C.C.)  
 STRAND ELECTRIC LTD., [1969] 2 C.C.C. 264 (Ont. C.A.)  
 STRASSER v. ROBERGE (1979), 50 C.C.C. (2d) 129 (S.C.C.)  
 STRATTON (1978), 42 C.C.C. (2d) 449, 90 D.L.R. (3d) 420, 3 C.R. (3d) 289 (Ont. C.A.)  
 STREET, (1970), 5 C.C.C. (2d) 232 (B.C. Co. Ct.)  
 STREET v. CITY OF GUELPH, [1965] 2 C.C.C. 215 (Ont. H.C.)  
 STREU, [1989] 1 S.C.R. 1521  
 STRONGQUILL, (1978), 43 C.C.C. (3d) 1 (S.C.C.)  
 STUPP et al. (1982), 36 O.R. (2d) 206, 32 C.R. (3d) 168 (Ont. H.C.)  
 SUBRAMANIAM v. PUBLIC PROSECUTOR, [1956] 1 W.L.R. 965 (P.C.)  
 SUNILA (1987), 35 C.C.C. (3d) 289 (N.S.C.A.)  
 SURETTE, (1981), 50 N.S.R. (2d) 588 (N.S.S.C.A.D.)  
 SUTTON, [1970] 3 C.C.C. 152, 9 C.R.N.S. 45 (Ont. C.A.)  
 SWANTSON, (1982), 65 C.C.C. (2d) 453 (B.C.C.A.)  
 SWARTZ (1977), 34 C.C.C. (2d) 477 (Man. C.A.)  
 SWIETLINSKI (1979), 22 O.R. (2d) 605, 44 C.C.C. (2d) 267, 5 C.R. (3d) 324 (Ont. C.A.)  
 SZOBOSZLOI, [1970] 5 C.C.C. 366 (Ont. C.A.), leave to appeal to S.C.C. refused *ibid*  
 SZOBOZLOI, [1970] 5 C.C.C. 366 (Ont. C.A.)  
 TALBOT, (No. 3), (1977), 38 C.C.C. (2d) Ont. H.C.)  
 TALLCREE (1989), 98 A.R. 343 (C.A.)  
 TALLY (1915), 23 C.C.C. 449 (Alta. S.C.)  
 TAN, (1975), 22 C.C.C. (2d) 184 (B.C.C.A.)  
 TANNER, (1978), 1 M.V.R. 145 (Ont. Dist. Ct.)  
 TARAFA, (1989), 53 C.C.C. (3d) 472 (Que. S.C.)  
 TARASCHUK, (1973), 9 C.C.C. (2d) 345 (Ont. H.C.)  
 TATOMIR, (1989), 51 C.C.C. (3d) 321 (Alta. C.A.) leave to appeal to S.C.C. refused February 15, 1990  
 TAYLOR, (1983), 10 W.C.B. 303 (Ont. Prov. Ct.)  
 TAYLOR (1979), 48 C.C.C. (2d) 523 (Nfld. C.A.)  
 TAYLOR (Feb. 11, 1980), unreported (Ont. S.C.)  
 TAYLOR v. U.S., 530 F. 2d 639 (U.S.C.A. 1976)  
 TECOGLASS, INC. v. DOMGLASS, INC., (1985), 51 O.R. (2d) 196 (Ont. C.A.)  
 TEPER, [1952] A.C. 480 (H.C.)  
 TERESINSKI, (1992), 70 C.C.C. (3d) 268 (Ont. C.A.)  
 TEWARI, (1987), 36 C.C.C. (3d) 150 (B.C.S.C.)  
 THATCHER, [1987] 1 S.C.R. 652, 32 C.C.C. (3d) 481  
 THERENS, [1985] 1 S.C.R. 613, 18 C.C.C. (3d) 481  
 THERIEN and SANSEVERINO (1943), 80 C.C.C. 87 (B.C.C.A.)  
 THIBODEAU (1955), 21 C.R. 265 (S.C.C.)

- THOMBS, (1986), 50 M.V.R. 31 (Ont. Prov. Ct.)  
THOMPSON, (1989), 16 M.V.R. (2d) 312 (N.S. Co. Ct.)  
THOMPSON, (1986), 48 M.V.R. 158 (B.C.C.A. in chambers) aff'd (1986), 45 M.V.R. 136 (B.C.C.A.)  
THOMPSON (1981), 12 M.V.R. 196, 61 C.C.C. (2d) 214 (Ont. H.C.J.)  
THOMPSON TPT LTD. (1973), 15 C.C.C. (2d) 574 (Ont. Prov. Ct.)  
THOMSEN, [1988] 1 S.C.R. 640  
THOMSON, [1988] 1 S.C.R. 640, 40 C.C.C. (3d) 411, 4 M.V.R. (2d) 185  
TISDALE, (1971), 13 C.R.N.S. 120 (Alta. Mag. Ct.)  
TITCHNER (1961), 131 C.C.C. 64, 35 C.R. 111 (Ont. C.A.)  
TITUS (1983), 2 C.C.C. (3d) 321, 33 C.R. (3d) 17 (S.C.C.)  
TJELTA, (1983), 25 M.V.R. 274 (B.C.S.C.)  
TODIISH, (1985), 18 C.C.C. (3d) 159 (Ont. C.A.)  
TORBIK and CAMPBELL (1975), 18 C.C.C. (2d) 229, 26 C.R.N.S. 108 (Ont. C.A.)  
TRAN, (1987), 35 C.C.C. (3d) 508 (Alta. Q.B.)  
TRAVES, (1986), 43 M.V.R. 192 (Ont. Dist. Ct.)  
TRAYNOR, (1982), 7 W.C.B. 232 (Ont. C.A.)  
TREMBLAY, [1987] 2 S.C.R. 435, 37 C.C.C. (3d) 535  
TRINIDAD LEASEHOLDINGS (CANADA) LTD. v. GORDON, [1953] O.W.N. 83 (Ont. Co. Ct.)  
TRIUMBARI, (1988), 42 C.C.C. (3d) 481 (Ont. C.A.)  
TROMBETTA, [1989] Ont. D. Crim. Conv. 5525-04 (Ont. Prov. Ct.)  
TROPIC CANADA LTD., (1980), 57 C.C.C. (2d) 1 (B.C.C.A.)  
TRUSCOTT, (Re.), [1967] 2 C.C.C. 285, 1 C.R.N.S. 1 (S.C.C.)  
TUCKEY, (1985), 20 C.C.C. (3d) 502 (Ont. C.A.)  
TURGEON, (1958), 120 C.C.C. 248 (Sask. Dist. Ct.)  
TURKIEWICZ et al. (1979), 10 C.R. (3d) 352, 50 C.C.C. (2d) 406 (Ont. C.A.)  
TURLON, (1989), 49 C.C.C. (3d) 186 (Ont. C.A.)  
TURLON, (1989), 49 C.C.C. (3d) 186 (Ont. C.A.)  
TURNER, [1970] 2 All E.R. 281  
TURVEY (1970), 12 C.R.N.S. 329, 1 C.C.C. (2d) 90 (N.S.S.C.)  
TWOYOUNGMEN, (1979), 3 M.V.R. 186 (Alta. C.A.)  
TYLER, [1950] O.W.N. 584, 97 C.C.C. 383 (Ont. Co. Ct.)  
TYNDALL, (1988), 15 M.V.R. 336 (2d) (Man. Prov. Ct.)  
TZIMPOULOS, (1986), 29 C.C.C. (3d) 304 (Ont. C.A.)  
U.S.A. v. SHEPPARD (1976), 34 C.R.N.S. 207, 30 C.C.C. (2d) 424 (S.C.C.)  
UNDERHILL (1955), 114 C.C.C. 320 (N.B.C.A.)  
UNITED CERAMICS, LTD., (1979), 52 C.C.C. (2d) 19 (Ont. Gen. Div.)  
VAISVYLA, (1958), 29 C.R. 71 (Sask. Dist. Ct.)  
VALLEE (15 May, 1980), unreported (Ont. H.C.) referred to at 15 C.R. (3d) 387  
VALLEY, (1986), 26 C.C.C. (3d) 207 (Ont. C.A.)  
VALLILLEE (1954), 107 C.C.C. 405, 18 C.R. 1 (Ont. C.A.)  
VALOIS and UNIVERSAL SPA LTEE., (1986), 33 C.C.C. (3D) 535 (Que. C.A.)  
VAN HEES (1958), 27 C.R. 14 (Ont. C.A.)  
VAN EVERY et al. v. VAN EVERY et al. (1983), 20 A.C.W.S. (2d) 199 (Ont. H.C.)  
VANDALE, (1989), 22 M.V.R. (2d) 288 (B.C. Co. Ct.)  
VANDERBEEK and ALBRIGHT (1971), 2 C.C.C. (2d) 45 (S.C.C.)  
VANLERBERGHE (1979), 6 C.R. (3d) 222 (B.C.C.A.)  
VARGA (1983), 24 M.V.R. 256 (B.C.S.C.)  
VAUGEOIS (1959), 29 W.W.R. 368 (B.C.C.A.)  
VERMETTE (1984), 6 C.C.C. (3d) 97 (Alta. C.A.)  
VERRETTE (1978), 40 C.C.C. (2d) 273 (S.C.C.)  
VETROVEC (1982), 67 C.C.C. (2d) 1, 27 C.R. (3d) 304 (S.C.C.)



VEZEAU (1976), 28 C.C.C. (2d) 81, 34 C.R.N.S. 309 (S.C.C.)  
 VEZINA, (1986), 23 C.C.C. (3d) 481 (S.C.C.)  
 VIGER (1958), 122 C.C.C. 159, 19 C.R. 302 (Ont. C.A.)  
 VINCENT, (1963), 40 C.R. 365 (Man C.A.)  
 VOORWINDE (1976), 29 C.C.C. (2d) 413 (B.C.C.A.)  
 VULCAN ASPHALT & SUPPLY CO. LTD., [1964] 1 C.C.C. 198, 42 C.R. 365 (Ont. C.A.)  
 W.(D.), (1991), 63 C.C.C. (3d) 397 (S.C.C.)  
 W.G.G., (1990), 57 C.C.C. (3d) 151 (Ont. C.A.)  
 WADDEN, (1986), 71 N.S.R. (2d) 253 (C.A.)  
 WAGNER, (1986), 26 C.C.C. (3d) 242 (Alta. C.A.)  
 WALKEM (1908), 14 C.C.C. 122 (B.C.C.A.)  
 WALKER (1982), 17 M.V.R. 154 (Sask. Prov. Ct.)  
 WALKER, [1939] S.C.R. 214  
 WALKER(1979), 5 M.V.R. 114, 48 C.C.C. (2d) 126 (Ont. Co. Ct.)  
 WALL (1968), 11 Cr. L.Q. 223 (Ont. Mag. Ct.)  
 WALLACE v. MAJOR, [1946] 1 K.B. 473 (C.A.)  
 WALLS, (1986), 47 M.V.R. 92 (B.C. Co. Ct.)  
 WALSH (1960), 33 W.W.R. 91 (Sask. Mag. Ct.)  
 WASCHUK (1970), 1 C.C.C. (2d) 463 (Sask. Q.B.)  
 WASYLYSLEN, (1987), 7 M.V.R. (2d) 273 (Man. Q.B.)  
 WATCH (1983), 10 C.C.C. (3d) 521, 24 M.V.R. 224, 37 C.R. (3d) 374 (B.C.S.C.)  
 WATERFIELD, [1963] 3 ALL E.R. 659 (C.A.)  
 WATERS, (unreported, Ont. Prov. Ct., Feb. 27, 1987, per Harris P.C.J.)  
 WATIER v. DIRECTOR OF MOTOR VEHICLE ADMINISTRATION OF SASK. et al. (1984), 28 M.V.R. 134, 34 Sask. R. 27 (Sask. Q.B.)  
 WATSON (1944), 81 C.C.C. 212 (Ont. C.A.)  
 WAWANESA MUTUAL INSURANCE v. HANES, [1961] O.R. 495 (Ont. C.A.) and [1963] S.C.R. 154 (S.C.C.)  
 WAYTE, (1982), 76 Cr. App. R. 110 (U.K.C.A.)  
 WEBB (1961), 36 C.R. 252, 36 W.W.R. 431, 131 C.C.C. 276 (B.C.S.C.)  
 WEBSTER (1981), 10 M.V.R. 310, 15 M.P.L.R. 60 (Ont. Dist. Ct.)  
 WEEDON, (1986), 7 M.V.R. (2d) 21 (B.C. Co. Ct.)  
 WEESK, (1985), 15 W.C.B. 186 (Ont. Dist. Ct.)  
 WEHAGE (1962), 41 W.W.R. 326, 40 C.R. 24 (Sask. Dist. Ct.)  
 WEIR et al. (No. 4) (1899), 3 C.C.C. 351 (Que. Q.B.)  
 WELSFORD, [1969] 4 C.C.C. 1, 6 C.R.N.S. 90 (S.C.C.)  
 WENTWORTH MAGISTRATE'S COURT, Ex parte REEVES, [1964] 2 O.R. 316 (Ont. H.C.)  
 WERENKA (1981), 11 M.V.R. 280 (Alta. Q.B.)  
 WEST (1982), 35 O.R. (2d) 179, 64 C.C.C. (2d) 417 (Ont. H.C.J.)  
 WEST, (1981), 13 M.V.R. 70 (Ont. H.C.)  
 WHITE, (1988), 42 C.C.C. (3d) 97, 6 M.V.R. (2d) 138 (S.C.C.)  
 WHITE, REGINA ex rel. v. FUDELL (1956), 116 C.C.C. 67 (Ont. H.C.J.)  
 WHITEHORSE (1940), 75 C.C.C. 65 (B.C.C.A.)  
 WHITMORE (1987), 41 C.C.C. (3d) 556 (Ont. H.C.), aff'd (1989), 51 C.C.C. (3d) 294 (Ont. C.A.)  
 WHOLESALE TRAVEL GROUP INC., (1991), 67 C.C.C. (3d) 193 (S.C.C.)  
 WHYTE, (1988), 42 C.C.C. (3d) 97 (S.C.C.)  
 WICK (1975), 20 C.C.C. (2d) 203 (Sask. Q.B.)  
 WILDMAN (1981), 60 C.C.C. (2d) 289 (Ont. C.A.)  
 WILKINSON (1934), 62 C.C.C. 63 (N.S.C.A.)  
 WILLIAMS, (1985), 18 C.C.C. (3d) 356 (Ont. C.A.)  
 WILLIAMS (1977), 35 C.C.C. (2d) 103 (Ont. Co. Ct.)

WILLIAMS (1958), 120 C.C.C. 34 (Ont. Mag. Ct.)  
WILLIAMS ex parte BARNETT (1971), 2 C.C.C. (2d) 298, [1971] 1 O.R. 703 (Ont. H.C.J.)  
WILLIAMS and THE REGISTRAR OF MOTOR VEHICLES (Re) (1973), 2 O.R. (2d) 473 (Ont. Co. Ct.)  
WINDREM, (unreported, Ont. Prov. Ct., Judicial District of Peel, May 27, 1985, per August P.C.J.)  
WING, (1963), 48 W.W.R. 311 (Alta. Dist. Ct.)  
WIS DEVELOPMENTS CORP. LTD., [1984] 1 S.C.R. 485, 12 C.C.C. (3d) 129  
WISE (1982), 67 C.C.C. (2d) 231 (B.C. Co. Ct.)  
WOLF, (1974), 17 C.C.C. (2d) 425, 27 C.R.N.S. 150 (S.C.C.)  
WOLFE, (1979), 3 M.V.R. 143 (B.C. Co. Ct.)  
WOLFF (1979), 1 M.V.R. 261, 46 C.C.C. (2d) 467, 9 B.C.L.R. 390, 6 C.R. (3d) 346 (B.C.C.A.)  
WOLFF (1966), 57 W.W.R. 702, 50 C.R. 77 (Sask. Mag. Ct.)  
WOLVERINE, [1987] 3 W.W.R. 475 (Sask. Q.B.)  
WOLYNEC (1989), 35 O.A.C. 236 (Ont. C.A.)  
WOOD, (1986), 28 C.C.C. (3d) 65 (Ont. C.A.)  
WOODS v. ELIAS, (1978), 21 O.R.  
WOOLWORTH (F.W.) CO. LTD. (1974), 18 C.C.C. (2d) 23 (Ont. C.A.)  
WORDEN, [1962] O.W.N. 61, 132 C.C.C. 197, 37 C.R. 34 (Ont. C.A.)  
WRAY, [1971] S.C.R. 272, [1970] 4 C.C.C. 2, 11 C.R.N.S. 235, 11 D.L.R. (3d) 673 (S.C.C.)  
WRIGHT v. TATHAM, (1837), 7 E.R. 559 (H.L.)  
YABLONSKI, [1973] 2 W.W.R. 732 (B.C. Prov. Ct.)  
YARROW v. BUIE, [1950] O.W.N. 553 (Ont. Co. Ct.)  
YOLLES, [1959] O.R. 206, 19 D.L.R. (2d) 19, 30 C.R. 93 (Ont. C.A.)  
YORSTON (1991), 27 M.V.R. (2d) 27 (N.S. Prov. Ct.)  
YOUNG, (1984), 13 C.C.C. (3d) 1, 40 C.C.C. (3d) 289 (Ont. C.A.)  
YOUNG, (1981), 64 C.C.C. (2d) 13 (B.C.C.A.)  
YOUNG v. SAYLOR (1893), 23 O.R. 513 (Ont. C.A.)  
YOUSSEF v. GILKER, (1980), 33 N.B.R. (2d) 383 (Q.B.)  
YUILL v. YUILL, [1945] 1 All E.R. 183  
Z.H. PAPER PRODUCTS LTD. (1979), 27 O.R. (2d) 570, 52 C.C.C. (2d) 91 (Ont. Div. Ct.)  
ZAMAL et al., [1964] 1 C.C.C. 12, 42 C.R. 378 (Ont. C.A.)  
ZANINI (1967), 2 C.R.N.S. 219 (S.C.C.)  
ZAVERSNUKE, (1982), 30 C.R. (3d) 273 (Man. Co. Ct.)  
ZEMBAL, (1987), 1 M.V.R. (2d) 335 (Ont. Prov. Ct.)  
ZUKOWSKI v. BRITISH COLUMBIA, (1986), 38 M.V.R. 293 (B.C.S.C.)  
ZUNDEL, (No.2) (1990), 53 C.C.C. (3d) 161 (Ont. C.A.), rev'd on other grounds, [1992] 2 S.C.R. 731  
ZUNDEL, (No.1) (1987), 31 C.C.C. (3d) 97, 56 C.R. (3d) 1 (Ont. C.A.)  
ZWICKER, (1994) (unreported, february 1, 1994, Ont. C.A.)





